85-419

No. .....

Supreme Court, U.S.
FILED
SEP 5 1985
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CLERK

In The

Supreme Court of the United States

October Term, 1985

—o—

GENERAL DRIVERS AND HELPERS UNION, LOCAL NO. 554, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

vs.

MID-CONTINENT BOTTLERS, INC., (Omaha Division), an Iowa Corporation,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

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15 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) provide jurisdiction to sue to enforce a collective bargaining agreement interest arbitration clause?

LIST OF PARTIES AND PRAYER

There are no other parties other than the Petitioner and Respondent. Teamsters Local No. 554 respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

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No. .....

In The

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October Term, 1985

GENERAL DRIVERS AND HELPERS UNION, LOCAL NO. 554, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

vs.

MID-CONTINENT BOTTLERS, INC., (Omaha Division), an Iowa Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION BELOW

The Eighth Circuit Court of Appeals held that Section 301 did not apply to interest arbitration and left the final compensation methods and rates to the parties to negotiate. The only issue left for the arbitrator was whether

the company could impose its final offer in response to impasse and make the union decide whether to strike. The Complaint was dismissed by the Circuit Court despite a request for remand by the Plaintiff to the District Court, deferring the case to arbitration. The case is not officially reported yet due to the amendment of the opinion by the Court. The opinion as modified on Petition on Rehearing is reprinted in Appendix A, Pages App. 29-34, along with the Motion for Rehearing and Brief.

The District Court held that the issue of future wages was not arbitrable under Article VI (the grievance section), found that Section 301 applies, and in a later part of the trial entered judgment for $98,774.84. The opinion on liability, Memorandum Opinion on damage and Order are in Appendix B, Pages App. 35-44. For the convenience of the Court, Appendix C, Pages App. 45-84, includes a copy of the labor agreement.

JURISDICTION

This Court has jurisdiction to review the judgment of the Court below pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case invokes Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). A copy of Section 301(a) is attached in Appendix D.

STATEMENT OF THE CASE

1

Statement of Facts

The applicable collective bargaining agreement (hereinafter referred to as CBA) which is set out in full in Appendix C, provided for a reopener of two items. (See Article XXIX) The two items were creation of new jobs due to institution of a pre-sell agreement and the method of compensation for bargaining unit members. Reopening occurred, negotiations followed, and impasse was reached at which time the employee implemented its final offer without submitting the issues of reopening to arbitration. Article XII of the CBA, *New Operations,* stated the following: "In the event any new job or job classifications were created in the general area covered by the provisions of this contract, the Employer will enter into negotiations with the Union for the Purpose of determining the wages, classifications and other conditions prior to the institution of such operation. (In the event the parties cannot agree, the matter *shall* (emphasis added) be subject to the Grievance Procedure in Article VI)." The Union did not strike nor file a grievance under Article VI but proceeded to Court to get a determination of liability for damages under 301 and to see if interest arbitration would be allowed. The Employer-Defendant claimed the only issue subject to arbitration was whether the employer could unilaterally implement its offer thus forcing the union to strike. The Order on Pre-Trial Conference sets out the issues as is attached in Appendix E.

2

Proceeding Below

A. THE DISTRICT COURT

The District Court tried the liability and damage portions of the 301 action and held the following:

(1) The suit is not subject to arbitration because it involved determination of wages.

(2) The damages are $98,774.84.

B. THE COURT OF APPEALS

Mid-Continent appealed and the case was heard before a three judge panel which ruled:

(1) The only issue to arbitrate is whether the employer could unilaterally implement its offer thus forcing the union to strike.

(2) No arbitration could be had to determine wages. This was only subject to negotiation.

(3) The 301 suit was dismissed.

A Rule 59 Motion for Rehearing was filed timely. It requested correction of the decision in that the Court held the Employer was denied in its request for arbitration, since the stipulations of the parties showed neither party requested arbitration in the lower court. Petitioner further requested deferral to arbitration. The Circuit Court corrected the opinion, denied the rehearing and ordered dismissal again. There was no deferral to arbitration.

———o———

REASONS FOR GRANTING THE WRIT

The Writ should be granted because of the conflict of the circuits on the issue of whether there is jurisdiction under Section 301 to grant interest arbitration and the importance of the arbitration issue in resolving industrial disputes.

(1) The Circuits Are In Conflict.

The more modern decisions of the circuits uphold interest arbitration and mandate specific performance. The following cases support the principle set out in the previous sentence:

(a) *Pressman's Local 50 v. Newspaper Printing Corp.*, 518 F. 2d 351 (6th Cir., 1975) aff'g 399 F. Supp. 593 (M.D. Tenn., 1974).

(b) *Pressman's Local 318 v. Piedmont Publishing Co.*, 393 F. 2d 221 (4th Cir., 1968), aff'g 263 F. Supp. 952 (M.D. N.C. 1967).

(c) *A. Seltzer & Co. v. Livingston*, 361 F. 2d 218 (2nd Cir.) (Per Curiam) aff'g 253 F. Supp. 509 (S.D. N.Y. 1966).

(d) And, *Division 892 of Electrical Railway Employees v. M. K. & O. Transit Lines, Inc.*, 319 F. 2d 488 (10th Cir., 1963), rev'g on other grounds, 210 F. Supp. 351 (N.D. Oklahoma 1962), Cert. Denied, 375 U.S. 944, 1963.

Oddly enough, the Eighth Circuit has spoken on this issue upholding interest arbitration in *Greater Kansas City Laborers District Council v. Builders' Association*, 326 F. 2d 867 (8th Cir., 1964), aff'g 213 F. Supp. 429 (W.D., Mo. 1963) Cert. Denied, 377 U.S. 917 (1964). And again in *Laundry, Dry Cleaning and Dye House Workers Interna-*

tional Union, Local 93 of Springfield, Missouri v. Robert M. Mahoney, 491 F. 2d 1029 (1974). Judge Heaney, one of the Judges in this case, upheld interest arbitration.

Other circuits have made the exact opposite determination on similar or analogous fact patterns:

(a) *Pressmen's Local 67 v. Potter Press,* 241 F. 2d 787 (1st Cir., 1957), aff'g 141 F. Supp. 553 (D. Mass. 1956), Cert. Denied 355 U.S. 817 (1957). [Decided prior to Steelworkers Trilogy mandating arbitration.]

(a) *Mailers Local 136 v. Newspaper, Inc.,* 329 F. 2d 312 (5th Cir., 1964), aff'g 226 F. Supp. 600 (W.D. Tex., 1963), Cert. Denied 377 U.S. 985 (1964); and

(c) *Typographical Local 21 v. San Francisco Newspaper Printing Co.,* 247 F. Supp. 963 (N.D. Cal. 1965).

In summary, since some Circuits have decided you can enforce interest or wage arbitration under 301 and others say no, there is a conflict in the Circuits. A question affecting contractual enforcement of collective bargaining agreements is worthy of some clarification and especially so in light of the fact that certiorari has been denied on both sides of the issue.

———o———

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

August 20, 1985

Robert D. St. Vrain
Clerk

314-425-5600
FTS: 279-5600

Mr. M. H. Weinberg
8901 Indian Hills Drive
Suite 1,
Omaha, Nebraska 68114

Mr. George C. Rozmarin
Swarr, May Law Firm
3535 Harney Street
Omaha, Nebraska 68131

Re: No. 84-2084-NE General Drivers and Helpers Union, etc. v. Mid-Continent Bottlers, Inc., etc.

Dear Counsel:

Enclosed please find copy of order entered today at the direction of the Court.

Sincerely,

/s/ Linda L. Penberthy
Senior Deputy Clerk

rmh

Enclosure (2)

cc: William L. Olson, Clerk, U. S. District Court
(82-0-256)
West Publishing Company
Commerce Clearing House
National Center for Automated Information Retrieval
Prentice Hall, Inc.
Bureau of National Affairs
Hon. John B. Jones, United States District Judge

UNITED STATES COURT OR APPEALS
For The Eighth Circuit

No. 84-2084-NE

General Drivers and Helpers Union, etc.,

Appellee,

vs.

Mid-Continent Bottlers, Inc., etc.,

Appellant.

Appeal from the United States District Court
for the District of Nebraska

In response to the appellee's petition for rehearing, the opinion is modified by substituting revised page one (1) attached to this order. The petition is, however, denied by the court.

August 20, 1985

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 84-2084

General Drivers and Helpers Union, Local No. 554 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Appellee,

vs.

Mid-Continent Bottlers, Inc., (Omaha Division), an Iowa corporation,

Appellant.

Appeal from the United States District Court
for the District of Nebraska.

Submitted: February 11, 1985
Filed: July 11, 1985

Before LAY, Chief Judge, and HEANEY and FAGG, Circuit Judges.

FAGG, Circuit Judge.

Mid-Continent Bottlers, Inc. (the Company) appeals from the district court's judgment in favor of the General Drivers and Helpers Union, Local No. 554 (the Union). The district court awarded damages on the Union's claim for breach of the collective bargaining agreement. We hold that the dispute is subject to the agreement's grievance and arbitration provisions and accordingly reverse the judgment of the district court.

The collective bargaining agreement in effect at the times relevant to this dispute provides in Article VI for negotiations and ultimately arbitration of "[a]ny controversy arising over the interpretation of, or adherence to, the terms or provisions of

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 84-2484 NE

GENERAL DRIVERS AND HELPERS UNION,
LOCAL NO. 554 affiliated with
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,

Appellee,

vs.

MID-CONTINENT BOTTLERS, INC. (Omaha Division),
an Iowa Corporation,

Appellant.

PETITION FOR REHEARING

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Attorney for Appellee.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 84-2484 NE

GENERAL DRIVERS AND HELPERS UNION,
LOCAL NO. 554 affiliated with
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,

Appellee,

vs.

MID-CONTINENT BOTTLERS, INC. (Omaha Division),
an Iowa Corporation,

Appellant.

PETITION FOR REHEARING

COMES NOW the Appellee and requests a rehearing in the above entitled case pursuant to FRAP 40 and Eighth Circuit Court Rules 15 and 16 based upon the following:

(1) The July 11, 1985 decision held that "The district court denied the Company's request for arbritration".

(2) The Order on Pretrial Conference dated September 23, 1983 at paragraph 8 under subtopic C, "Uncontroverted Facts" held as follows:

> "Neither party has filed a grievance pursuant to the collective bargaining agreement or requested of the other party that the dispute herein be submitted to arbitration."

(3) Volume I of the Transcript of the court trial taken March 6, 1985 at page 85 beginning at line 7 discloses that the Company did not request arbitration and the testimony at page 86 line 5 indicates that the Company felt they had no right to arbitrate. Further testimony beginning at page 92, line 19, indicates that the Company would arbitrate but would not waive mootness or time limit objections.

(4) The July 11, 1985 decision did not require arbitration allegedly requested and denied by the district court upon the request of the Company.

(5) Article VII of the Petition and the Petition's prayer requested specific performance of the agreement which could include arbitration. The union has no objection to arbitration.

(6) The Order on Pretrial Conference dated September 23, 1983 specifically addressed the arbitration issue under the topic "Controverted and Unresolved Issues".

WHEREFORE, the Appellee prays for a rehearing to determine the issue as to whether under this Section 301 action the Eighth Circuit Court of Appeals should require deferral to arbitration allegedly requested but denied by the district court to the employer withholding dismissal of the action until arbitrability of the disptue is determined or, in the alternative, consider whether arbitration has been waived by both parties by failing to elect same in a timely fashion, thus allowing the damage action.

DATED this 13th day of July, 1985.

GENERAL DRIVERS AND HELPERS UNION, LOCAL 554, Plaintiff and Appellee,

By /s/ M. H. Weinberg
Weinberg & Weinberg, P.C.
8901 Indian Hills Dr.
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Omaha, NE 68114
(402) 397-0999

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 1985, I served a copy of the above and foregoing pleading upon George Rozmarin, Attorney for the Appellant, at 3535 Harney Street, Omaha, Nebraska, 68131 by United States Mail, postage prepaid.

/s/ M. H. Weinberg

App. 9

- Pet on Rehearing

P 428 046 906

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TOTAL Postage and Fees	$

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July 13, 1985

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St. Louis, MO 63101

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X Joe Hogan

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DOMESTIC RETURN RECEIPT

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 84-2484 NE

GENERAL DRIVERS AND HELPERS UNION,
LOCAL NO. 554 affiliated with
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,

Appellee,

vs.

MID-CONTINENT BOTTLERS, INC. (Omaha Division),
an Iowa Corporation,

Appellant.

BRIEF IN SUPPORT OF THE PETITION FOR REHEARING

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Attorney for Appellee.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 84-2484 NE

GENERAL DRIVERS AND HELPERS UNION,
LOCAL NO. 554 affiliated with
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,

Appellee,

vs.

MID-CONTINENT BOTTLERS, INC. (Omaha Division),
an Iowa Corporation,

Appellant.

BRIEF IN SUPPORT OF THE
PETITION FOR REHEARING

The issue requested to be decided on rehearing is whether the 301 action should be stayed pending arbitration or dismissed. The Supreme Court in *Drake Bakeries vs. Bakery Workers,* 50 LRRM 2440 held that a stay should follow a referral to arbitration in a situation involving a broad arbitration clause under a collective bargaining agreement covered by New York laws which give the arbitrator the right to award damages.

The Plaintiff-Appellee requests the same deferral to arbitration and requests that the Mandate require the District Court to retain jurisdiction pending the submission of all issues which are arbitrable to the arbitrator.

The Plaintiff-Appellee is not in default in requesting such due to the time in bringing this case to Court since

this Court held that the Employer requested arbitration and its request was denied by the District Court.

A copy of the decision is attached.

DATED this 22nd day of July, 1985.

GENERAL DRIVERS AND HELPERS UNION, LOCAL NO. 554 affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Plaintiff and Appellee,

By /s/ M. H. Weinberg, #14435
Weinberg & Weinberg, P.C.
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 1985, I served a copy of the above and foregoing Brief in Support of the Petition for Rehearing upon George C. Rozmarin, Attorney for the Appellant, at 3535 Harney Street, Omaha, Nebraska, 68131, by United States mail, postage prepaid.

DRAKE BAKERIES v. BAKERY WORKERS

Supreme Court of the United States

DRAKE BAKERIES, INC. v. LOCAL 50, AMERICAN BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO, et al., No. 598, June 18, 1962

LABOR MANAGEMENT RELATIONS ACT

—Breach of no-strike clause—Damage action—Stay pending arbitration —80.8432 —94.80 —94.163 —94.585 —80.565

Employer's damage action against union, under Section 301 of LMRA, for alleged breach of no-strike clause should be stayed pending arbitration of the damage claim, where broad arbitration clause in the parties' contract covers this claim, in that it applied to all disputes involving any act of either party or any relation between the parties, directly or indirectly. Union's alleged breach of no-strike clause did not constitute repudiation or waiver of arbitration of employer's damage claim.

—Breach of no-strike clause—Arbitration of damage claim—Waiver —94.24 —80.8432

Union's failure to seek arbitration until day employer instituted damage action against union for breach of no-strike clause did not constitute waiver by union of its right to insist upon arbitration of such damage claim, since up to that time the invocation of grievance-arbitration procedure was up to employer.

On writ of certiorari to the U. S. Court of Appeals for the Second Circuit (48 LRRM 2987§ 294 F.2d 399). Affirmed.

See also 47 LRRM 2612, 287 F.2d 155.

Robert Abelow (Milton Haselkorn, Marshall C. Berger, and Weil, Gotschal & Manges, with him on the brief), New York, N. Y., for petitioner.

Howard N. Meyer (Paul O'Dwyer, with him on the brief), New York, N. Y., for respondent.

Edward Maguire and Herman A. Gray, New York, N. Y., filed brief for New York State AFL-CIO as amicus curiae seeking affirmance.

Full Text of Opinion

Mr. Justice WHITE delivered the opinion of the Court.

The petitioning company brought this action for damages in the District Court under § 301(a) of the Taft-Hartley Act, alleging that the respondent union had violated the no-strike clause of the collective bargaining contract between the union and the company. The sole question in the case is whether the District Court was correct in holding that the employer's claim was an arbitrable matter under the contract and in ordering a stay of the action pending completion of arbitration. The Court of Appeals for the Second Circuit affirmed the judgment of the District Court by an equally divided vote.[1] This Court granted

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[1] The Court of Appeals originally heard the appeal before a three-judge panel, which reversed the judgment below. But rehearing was ordered before the active judges of the court, who divided 3-3 on the merits, and by a 4-2 vote withdrew the panel decision and affirmed the judgment below. The propriety of this procedure was questioned in the petition for certiorari, but later petitioner abandoned the question.

granted certiorari (368 U.S. 975), and set the cause for argument together with Atkinson v. Sinclair Refining Co., *ante*, ——, 50 LRRM 2433, decided this day.

[FACTS OF CASE]

The company's business is baking and selling cakes and other bakery products. On December 16, 1959, the company notified the union and its employees that because Christmas and New Year's would fall on Friday and because it was desirable to have fresh bakery products to sell on the Mondays following the holidays, employees

—locates related rulings in Cumulative Digest and monthly Classification Guide

would not work on the Thursday before Christmas and New Year's but would work on the Saturdays following those holidays. Meetings between the union and the company on December 18 and December 22 ensued, the company's position being that it was exercising management's prerogative in rescheduling work, the union's that the proposed work schedule violated the collective bargaining contract and that the employees were not obligated to work on December 26 or January 2. A compromise arrangement was worked out for December 26, and 80 out of 190 employees reported on that day, a sufficient number to allow production to proceed. Further conversations on December 28 were not fruitful, however, and on Saturday, January 2, the company was unable to produce its goods because only 26 employees reported for work. The company promptly filed this damage action on January 4, 1960, alleging that the union instigated and encouraged its members to strike or not to report for work on January 2, all in violation of the no-strike clause contained in the collective bargaining

contract. No answer has been filed by the union but the union's affidavit in support of the motion for stay stated what its answer would contain an dspecifically denied that the union had instigated a strike or encouraged its members not to work on January 2.

As was true in Atkinson, *supra,* the issue of arbitrability is a question for the courts and is to be determined by the contract entered into by the parties. "* * * [A] party cannot be required to submit to arbitration any dispute which he had not agreed so to submit." United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582, 46 LRRM 2416. But the contract here is much different from the agreement in Atkinson. Under Article V[2] of the contract: "The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances

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[2] "Article V—Grievance Procedure

"(a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.

"In the adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.

"(b) If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party. The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided."

arising between them involving questions of interpretation or application of any cause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly."

This is broad language, indeed, and the procedure thereafter provided in Article V does not, as did in Atkinson, exclude claims or complaints of the employer. It is provided that in the first instance the union will be represented by a committee and the shop chairman, and the employer, by the shop manager. Failing adjustment at this stage, the issue is required to be submitted in writing by "the party claiming to be aggrieved to the other party," whereupon the union and the plant manager are to attempt to reach a satisfactory agreement. If agreement is not reached within seven days from the time the issue is submitted in writing, either party "shall have the right to refer the matter to arbitration * * *"

Article V does not stop with disputes "involving the interpretation or application of any clause or matter" covered by the contract. The adjustment and arbitration procedures are to apply to all complaints, all disputes and all grievances involving any act of either party, or any conduct of either party, or any relation between the parties, directly or indirectly. The company asserts that there was a strike by the union in violation of the no-strike clause. It therefore has a "complaint" against the union concerning the "acts" or "conduct" of the union. There is also involved a "dispute" between the union and the company, for the union denies that there was a strike at all, denies that it precipitated any strike, denies that the employees were obligated under the contract to work on that January 2, and itself claims that the employer

breached the contract in scheduling work for the holidays.[3] Article V on its face easily reaches the employer's claim against the union for damages caused by an alleged strike in violation of the contract.

[THEORY OF EMPLOYER]

The company earnestly contends that the parties cannot have intended to arbitrate so fundamental a matter as a union strike in breach of contract, and that only an express inclusion of a damage claim by the employer would suffice to require arbitration. But it appears more reasonable to us to expect such a matter, if it is indeed so fundamental and so basic to the company under the contract, to have been excluded from the comprehensive language of Article V if the parties so intended. In Article VII,[4] which contains the no-strike provisions, the parties

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[3] Immediately before the Christmas weekend in 1959, petitioner and respondent exchanged telegrams, in the course of which exchange respondent charged:

"We have informed you that we did not agree with, or accept your proposal to amend or alter past practice concerning holiday weekends. Your proposed schedule and your threats of disciplinary penalties violates contract and practice. * * * If you do not retract position we shall demand arbitration."

[4] "Article VII—No Strikes

"(a) There shall be no strike, boycott, interruption of work stoppage, temporary walkout or lock-out for any reason during the terms of this contract except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision.

"(b) The parties as part of the consideration of this agreement that neither the International Union, the Local Union, or any of its officers, agents or members, shall be liable for dam-

(Continued on next page)

prohibited strikes, insulated the union, its officers and members from damages for strikes which the union did not authorize, and agreed that, even in the case of unauthorized strikes, the company would arbitrate disciplinary action taken against the strikers. In the face of the comprehensive language of Article V, it would have been most appropriate at this point for the parties to have excluded from the arbitration procedures the company's claim for strike damages, if they had intended to do so. Instead, the inclusive coverage of Article V was left intact.

Of significance also are certain events which occurred in August 1959. At that time the company took issue with union conduct in connection with overtime work. Labeling this conduct an "overtime strike" and a "breach of contract," the company wrote a letter to the State Mediation Board of New York saying that the contract with the union provided for arbitration of disputes before an arbitra-

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(Continued from previous page)

ages for unauthorized stoppage, strikes, intentional slowdowns or suspensions of work if:

"(a) The Union gives written notice to the Company within twenty-four (24) hours of such action, copies of which shall be posted immediately by the Union on the bulletin board that it has not authorized the stoppage, strike, slowdown or suspension of work and

"(b) if the Union further cooperates with the Company in getting the employees to return and remain at work.

"It is recognized that the Company has the right to take disciplinary action, including discharge, against any employee who engages in any unauthorized strike or work stoppage, subject to the Union's right to submit to arbitration in accordance with the agreement the question of whether or not the employee did engage in any unauthorized strike or work stoppage."

tor appointed by the Board and requesting the appointment of an arbitrator to "determine the question of breach of contract and damages suffered by" the company as a result of the strike. An award of damages against the union was requested, as was injunctive relief against a continuance of the overtime strike.[5] It would appear, then, that the company, just four months earlier in 1959, considered that the fundamental matter of a union-led strike was a dispute to be arbitrated under the provisions of the contract.[6]

The company further asserts that even if it agreed in the contract to arbitrate union violations of the no-strike clause, it is excused by the union's breach from pursuing the post-breach remedies called for in the contract. The company does not deny that grievance and arbitration procedures under this contract—as is true generally (United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584, 46 LRRM 2416)—contemplate as a matter of course the arbitration of many alleged breaches of contract. Indeed, central to the company's position is its assertion that the union was bound to arbitrate, rather than strike over, its claim that the company breached the contract by scheduling Saturday work. But in its view, the

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[5] Apparently the employer's thought was that the federal law should borrow the New York rule which is that an arbitrator may award relief in the nature of an injunction, enforceable in the courts regardless of the New York statute similar to the Norris-LaGuardia Act. Ruppert v. Egelhofer, 3 N.Y.2d 576, 148 N.E.2d 129, 29 LA 775.

[6] The union opposed arbitration of this dispute, claiming that there was no arbitrable controversy as to the claimed existence of an obligation to work overtime. The parties settled the controversy without conclusive determination of the arbitrability dispute.

union's violation of the no-strike clause is *sui generis* and so basic to what the employer bargained for in the contract and so inherently and "fundamentally inconsistent with" the grievance and arbitration procedures that the faithful observance of the no-strike clause by the union is a condition precedent to the employer's duty to arbitrate (even though he has promised to do so), or that the union must be deemed to have waived, or to be estopped from asserting, its right to arbitrate.

[EFFECT OF STRIKE]

However, this Court has prescribed no such inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining contract in every situation.[7] The company has not attempted, or claimed the right, either to terminate the entire contract or to extinguish permanently its obligations under the arbitration provisions. Instead, it has sued for damages for an alleged strike and, as far as this record reveals, the contract continued in effect, as did the promises of the parties to arbitrate and the promise of the union not to strike. Moreover, in this case, under this contract, by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon

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[7] We do not undestand the opinions in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455, 40 LRRM 2113, 2120, or United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567, 46 LRRM 2414, to enunciate a flat and general rule that these two clauses are properly to be regarded as exact counterweights in every industrial setting, or to justify either party to the contract in wrenching them from their context in the collective agreement on the ground that they are mutually dependent covenants which are severable from the other promises between the parties.

the absence of strikes. They have thus cut the ground from under the argument that an alleged strike, automatically and regardless of the circumstances, is such a breach or repudiation of the arbitration clause by the union that the company is excused from arbitrating, upon theories of waiver, estoppel, or otherwise.[8] Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach;[9] and in determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed

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[8] In Local 174 v. Lucas Flour Co., 369 U.S. 95, 105-106, 49 LRRM 2717, it was held that a clause requiring the parties to submit disputes to final determination by arbitration implied an obligation not to strike over such disputes. Accordingly, the Court upheld an employer's § 301 breach of contract suit against the union for strike damages due to a walkout over an arbitrable dispute. In that case, unlike the present one, the union conceded that there had been a strike over a grievance which the union had agreed to submit to arbitration. The only question in dispute was liability *vel non*. The union did not contend that, and the Court did not consider whether, the employer's damage claim should have been taken to an arbitrator. And, of course, the Court did not consider whether the union's breach of the no-strike clause constituted a repudiation or waiver of arbitration of the damage claim.

[9] See In re Pahlberg Petition, 131 F.2d 968 (C.A.2d Cir.); Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 (C.A.2d Cir.); Pennsylvania Greyhound Lines v. Amalgamated Assn., 98 F.Supp. 789, 16 LA 906 (E.D.Pa.), rev'd on other grounds, 193 F.2d 327, 17 LA 688 (C.A.3d Cir.); Batter Bldg. Mats. Co. v. Kirschner, 142 Conn. 1, 110 A.2d 464; Heyman v. Darwins, Ltd., [1942] A.C. 356 (H. L.) (disapproving Jureidini v. National Br. & Ir. Ins. Co., [1915] A. C. 499, 505 (H. L.)). See also Shanferoke Coal Corp. v. Westchester Serv. Corp., 70 F.2d 297, 299 (C.A.2d Cir.), aff'd, 293 U.S. 449, 453-454.

repudiation are critically important.[10] In this case the union denies having repudiated in any respect its promise to arbitrate, denies that there was a strike, denies that the employees were bound to work on January 2 and asserts that it was the company itself which ignored the adjustment and arbitration provisions by scheduling holiday work.

In passing § 301, Congress was interested in the enforcement of collective bargaining contracts since it would "promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace" (S. Rep. No. 105, 8th Cong., 1st Sess. 17). It was particularly interested in placing "sanctions behind agreements to arbitrate grievance disputes" (Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456, 40 LRRM 2113, 2120). The preferred method for settling disputes was declared by Congress to be "final adjustment by a method agreed upon by the parties" (§ 203(d) of the Act, 29 U.S.C. § 173(d)). "That policy can be effectuated only if the means chosen by the parties for settling their damages under the collective bargaining agreement is

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[10] 6 Corbin, Contracts § 1443 (1961 Supp., n. 34, pp. 192-193) states:

"The effect of a repudiation upon the repudiator's right to arbitration should depend on the character of his so-called 'repudiation' and the reasons given for it. One who flatly repudiates the provision for arbitration itself should have no right to the stay of a court action brought by the other party. But mere nonperformance, even though unjustified, is not *per se* a 'repudiation.' One who asserts in good faith that the facts justify him in refusing performance of other provisions in the contract should not thereby lose his right to arbitration that he would otherwise have had. There is no inconsistency in his demanding arbitration at the same time that he asserts his legal privilege not to proceed with performance."

given full play" (United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566, 46 LRRM 2414). Under our federal labor policy, therefore, we have every reason to preserve the stabilizing influence of the collective bargaining contract in a situation such as this. We could enforce only the no-strike clause by refusing a stay in the suit for damages in the District Court. We can enforce both the no-strike clause and the agreement to arbitrate by granting a stay until the claim for damages is presented to an arbitrator. This we prefer to do.[11]

[OTHER CASES]

Petitioner relies upon decisions by various Courts of Appeals, denying stays of damage suits for breach of no-strike clauses for want of arbitrability of the dispute.[12] Most of them, however, involved far more narrowly drawn arbitration clauses than that which is involved here.[13] And

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[11] Cf. Boone v. Eyre, 1 H. Bl. 273, 126 Eng. Rep. 160 (K. B. 1777) (L. Mansfield): "* * * [W]here mutual covenants go to the whole of the consideration on both sides, they are mutual conditions the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant and shall not plead it as a condition precedent." See also Dermott v. Jones, 23 How. 220, 231.

[12] These cases are collected in the withdrawn decision of the three-judge panel of the Court of Appeals, 287 F.2d 155, 158 n. 4, 47 LRRM 2612. See also Vulcan-Cincinnati Inc. v. United Steelworkers, 289 F.2d 103, 48 LRRM 2008 (C.A. 6th Cir.).

[13] Eg. United Furniture Workers v. Colonial Hardwood Co., 168 F.2d 33, 22 LRRM 2102 (C.A.4th Cir.), where arbitration was limited to employee grievances over wages, hours, or working conditions, as in Atkinson v. Sinclair Refining Co., ante, —, 50 LRRM 2433 and United Automobile Workers v. Benton Harbor Indus., 242 F.2d 536, 39 LRRM 2689 (C.A.6th Cir.);

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in at least two Court of Appeals decisions involving clauses of comparable breadth to that of the instant case, violations of no-strike clauses have been held to be arbitrable and suits for damages have been stayed pending arbitration.[14]

This Court held in Mastro Plastics Corp. v. Labor Board, 350 U.S. 270, 37 LRRM 2587, that an employer did not have the right to replace employees who had struck over employer unfair labor practices, in the face of an absolute no-strike clause. It was said that, despite the broad prohibition of strikes in the contract, the parties could not have intended to waive the employees' right to strike over a flagrant unfair labor practice, absent an express statement in the contract to that effect. The company urges that Mastro precludes the result we have reached in this case. Mastro, however, involved a flagrant unfair labor practice by the company threatening the very existence of the union itself. A strike in violation of contract is not

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Cuneo Press. Inc. v. Kokomo Union, 235 F.2d 108, 38 LRRM 2330 (C.A.7th Cir.), where arbitration was limited to employee grievances. But see United E. R. & M. Wkrs. v. Miller Metal Prods., Inc., 215 F.2d 221, 34 LRRM 2731 (C.A.4th Cir.) ("all differences, disputes and grievances that may arise between the parties to this contract with respect to the matters covered in this agreement"); Market Elec. Prods., Inc. v. United E. R. & M. Wkrs., 202 F.2d 435, 19 LA 849, 20 LA 147 (C.A.2d Cir.) ("difference * * * as to the meaning and application of the provisions of this agreement * * * or any trouble of any kind * * * in the plant").

[14] Signal Stat Corp. v. Local 475, 235 F.2d 298, 38 LRRM 2378 (C.A.2d Cir.); Yale & Towne Mfg. Co. v. Local 1717, — F.2d —, 49 LRRM 2652 (C.A.3d Cir.). See id., at — n. 5, collecting authorities from lower courts. Under New York law, broad arbitration clauses permit arbitrators to award damages. See Matter of Publishers Assn., 8 N.Y.2d 414, 171 N.E.2d 323, 35 LA 673.

per se an unfair labor practice[15] and there is no suggestion in this record that the one-day strike involved here was of that nature. We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union. We do decide and hold that Article V of this contract obligates the company to arbitrate its claims for damages from forbidden strikes by the union and that there are no circumstances in this record which justify relieving the company of its duty to arbitrate the consequences of this one-day strike, intertwined as it is with the union denials that there was any strike or any breach of contract at all.

If the union did strike in violation of the contract, the company is entitled to its damages; by staying this action, pending arbitration, we have no intention of depriving it of those damages. We simply remit the company to the forum it agreed to use for processing its strike damage claims. That forum, it is true, may be very different from a courtroom,[16] but we are not persuaded that the remedy there will be inadequate. Whether the damages to be awarded by the arbitrator would not normally be expected to serve as an "effective" deterrent to future

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[15] United Mine Workers v. Labor Board, 257 F.2d 211, 42 LRRM 2264 (C.A. D.C. Cir.); Lodge No. 12 v. Cameron Iron Works, Inc., 257 F.2d 467, 473, 42 LRRM 2431 (C.A.5th Cir.); see Dowd Box Co. v. Courtney, 368 U.S. 502, 513, 49 LRRM 2619; H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41-42.

[16] Bernhardt v. Polygraphic Co., 350 U.S. 198, 203, 25 LA 693.

strikes, which the company urges, is not a question to be answered in the abstract or in general terms. This question, as well as what result will best promote industrial peace, can only be answered in the factual context of particular cases. Here, the union claims it did not call a strike and that the men were not bound to work on January 2, basing its claim upon years of past practice under the contract. The dispute which this record presents appears to us to be one particularly suited for arbitration, if the parties have agreed to arbitrate. We hold that they did so agree and will hold the company to its bargain.

[UNION NOT IN DEFAULT]

A final matter is the company's suggestion that the union is not entitled to a stay because it has not proceeded with dispatch in seeking arbitration. The District Court held that the union was not in default, and we agree. If the company had a claim for damages, the contract provided for the company's attempting to adjust its claim by consulting with the union. Failing this, either party could take the matter to arbitration. The company's claim arose out of events which occurred on January 2. This case was filed on January 4. This was the first occasion for the union to insist upon its right to arbitrate the employer's claim for damages. This it promptly did by moving for a stay in the District Court.[17] As its conduct shows in a previous situation, the employer was aware of the procedure to be followed.[18] It should have followed it here.

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[17] Compare Shanferoke Coal Corp. v. Westchester Serv. Corp., 70 F.2d 297, 299 (C.A.2d Cir., Hand, J.), aff'd, 293 U.S. 449, 453-454, with Lane, Ltd. v. Larus & Bro. Co., 243 F.2d 364 (C.A.2d Cir.).

[18] See text accompanying notes 4-5, supra.

For the foregoing reasons, the judgment affirming the opinion of the District Court was correct, and, on the merits, the panel decision properly withdrawn.

Affirmed.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

Dissenting Opinion

Mr. Justice HARLAN, dissenting.

The question presented in this case is whether the parties to this collective bargaining agreement intended that a court, rather than an arbitrator, should decide the employer's claim that the union had violated the no-strike clause of the agreement. Whether a strike in breach of contract has occurred, and if so, what damages have been suffered, are matters with respect to which a court of law can hardly be deemed less competent, as an adjudicator, than an arbitrator. There is no special reason to suppose that the parties preferred to submit this kind of a dispute to an arbitrator whose expertise is more likely to be in the area of employees' grievance claims, as in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580-582, 46 LRRM 2416; United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597-598, 46 LRRM 2423. The less so, from the standpoint of the employer, when it is recognized that any damages awarded by an arbitrator would not be self-enforcing.

It would require more persuasive evidence than either this collective agreement or record affords to persuade me

that it was contemplated that the employer would forego his statutory remedy under § 301 respecting alleged violations of the no-strike clause of the collective agreement. I would reverse the judgment below substantially for the reasons given in the panel opinion of the Court of Appeals, 287 F.2d 155, 47 LRRM 2612.

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 84-2084

General Drivers and Helpers Union, Local No. 554 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Appellee,

vs.

Mid-Continent Bottlers, Inc. (Omaha Division), an Iowa corporation,

Appellant.

Appeal from the United States District Court
for the District of Nebraska.

Submitted: February 11, 1985
Filed: July 11, 1985

Before LAY, Chief Judge, and HEANEY and FAGG, Circuit Judges.

FAGG, Circuit Judge.

Mid-Continent Bottlers, Inc. (the Company) appeals from the district court's judgment in favor of the General Drivers and Helpers Union, Local No. 554 (the Union). The district court denied the Company's request for arbitration aid awarded damages on the Union's claim for breach of collective bargaining agreement. We hold that the dispute is subject to the agreement's grievance and arbitration provisions and accordingly reverse the judgment of the district court.

The collective bargaining agreement in effect at the times relevant to this dispute provides in Article VI for negotiations and ultimately arbitration of "[a]ny controversy arising over the interpretation of, or adherence to, the terms or provisions of this Agreement." In Article XXIX, the parties provided for reopener of portions of the agreement "should the Employer elect to go to an advance sell-system." The reopener is

> limited to the issue[ ] of * * * a change in the method of compensation * * * for employees currently classified as route salespersons who could continue to deliver product under an advance sale system, from commission to base rate plus commission, an hourly basis, or any other payment method determined by the Employer to be appropriate.

Article XX generally prohibits all strikes and lockouts, but Article XXIX makes Article XX "inoperative until an agreement is reached" if "the parties are unable to negotiate an agreement during the reopener."

In December 1980, the Company notified the Union of its intent to exercise the reopener. After six months of negotiations, the Union rejected the Company's final offer, and the parties were at impasse. The Company then

unilaterally implemented its final offer in July 1981, transferring some of the sales function previously performed by Union members out of the bargaining unit and effectively reducing Union members' earnings. In May of 1982, the Union filed an action for damages for breach of the agreement in the district court of Nebraska, contending that the Company could not unilaterally alter the compensation system during the life of the agreement.

Although the district court did not "think that [this] is the type of issue that requires arbitration," it recognized that resolution of the dispute required interpretation of Article XXIX. It then held that, while the Company had authority under Article XXIX to change the duties of Union members, the Company violated the agreement by imposing a new compensation system that resulted in lower salaries for Union members. The Company appeals, claiming that the dispute is subject to the grievance and arbitration procedures of Article VI and that the district court consequently lacked jurisdiction to pass on the merits.

A party's assent to arbitration, as a matter of contract construction, is a question of law for the court. *International Union, UAW v. General Electric Co.*, 714 F.2d 830, 831-32 (5th Cir. 1983). Our review is guided by the overwhelming federal policy in favor of arbitration of labor disputes. "An order to arbitrate a grievance should be granted "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *Id.* at 832. (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). This court is

"obliged to give broad and liberal interpretation to arbitration clauses in collective bargaining agreements." *Bonnot v. Congress of Independent Unions Local #14*, 331 F.2d 355, 358 (8th Cir. 1964).

Clearly, the contention of the Company that a right existed under the contract unilaterally to implement its final offer to the Union upon reaching impasse in reopener negotiations presented a controversy over interpretation of or adherence to the bargaining agreement within the arbitration provision. The Union claims, however, that resolution of the dispute is beyond the power of any arbitrator because it requires setting wages for jobs not described in the agreement. In addition, the Union claims that its reservation of a right to strike over wage disputes during reopener evidences an intent to exclude this dispute from arbitration. We find neither contention persuasive.

First, the Union claims the only matter for resolution is the amount of compensation the bargaining unit members should have received after the Company implemented its new sales program. According to the Union, an arbitrator is incapable of setting compensation rates for jobs not described in the agreement. The Union's contention, however, ignores the question of whether the Company's unilateral action violates the agreement at all. Resolution of that question is committed by Article VI to arbitration.

Second, the Union claims that, by reserving the right to strike if the parties failed to reach agreement on the reopener, arbitration over reopener disputes was not intended to be exclusive. We do not believe the strike-lockout clause in Article XXIX affects the Company's right to

have this dispute over "the interpretation of, or adherence to" the bargaining agreement arbitrated. Even if the Union could have removed the dispute from the arbitration requirement by calling a strike when the parties reached impasse, it did not do so. Instead, it sought a judicial determination that the Company's unilateral action violated the agreement. Under Article VI, that determination has been committed to arbitration. "The right to have all controversies over interpretation of or adherence to the provisions of the bargaining agreement submitted to and determined by arbitration was one existing in favor of both parties. Neither could deprive the other of any aspect of the right either in scope or in incident." *Minnesota Joint Board, Amalgamated Clothing Workers of America v. United Garment Manufacturing Co.*, 338 F.2d 195, 198 (8th Cir. 1964).

The arbitrator's decision is not rendered meaningless because a strike or lockout may follow the decision. If the arbitrator decides that the agreement permits the unilateral action taken by the Company, the Union is free to strike. If the arbitrator decides against the Company, the Company is free to lockout. The final compensation methods and rates are for the parties to negotiate. The question posed by the Union in this case, whether the Company could impose its final offer in response to impasse and make the Union decide whether to strike, is for the arbitrator. No room remains for litigation.

This dispute presents a question which on its face is subject to arbitration and we find nothing in the agreement that excludes it from the arbitration procedure. Thus, the district court committed error by deciding the case on the merits. Accordingly, we reverse the judgment

of the district court and the case is remanded with directions to dismiss the complaint.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2484-NE

GENERAL DRIVERS AND HELPERS UNION, LOCAL NO. 554, Affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Plaintiff-Appellee,

vs.

MID-CONTINENT BOTTLERS, INC.,
(Omaha Division), An Iowa Corporation,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

HONORABLE JOHN B. JONES,
UNITED STATES DISTRICT JUDGE

BRIEF OF APPELLANT

GEORGE C. ROZMARIN

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ADDENDUM

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CONTRACT EXCERPTS (ARTS. VI. XX, XXIX)	J

(p. 142) How long it is going to take me to read this material again and the exhibits and decide the case, if I conclude it is going to take me an hour or two, I will have Miss Porter let you know and tell you when to come back. If I conclude that I can decide it in the next half hour, then I will just have you stay and we will resolve it.

I do appreciate and I want to express that now the expeditious way that both sides have presented the case and we will, hopefully, not take up too much of your time here while it is under deliberations.

We will be in recess fifteen minutes.

(At which time a recess is taken)

THE COURT: I have no doubt, if I took this case back to Sioux Falls with me and with the assistance of my law clerks, I could draw up a written memorandum opinion that would be, perhaps, a good deal more polished than what I am going to do this afternoon. But, I think that this case has been going long enough and the issues are simple enough that I feel comfortable deciding the matter now.

Let me say that I will follow the pretrial conference order in which the parties have agreed that the issues of liability and the extent of the remedy would be bifurcated and I'm not going to try to discuss in any manner the remedy now. We will talk about it for (p. 143) a moment afterwards, about scheduling.

The issue here, as I see it, is whether or not the Employer defendant here acted properly in placing into

effect the Addendum Exhibit 2 when it did so July 20th, 1982. It is my view that the action of the National Labor Relations Board did not preclude this Court from considering that issue. I also find that Article VI of the Agreement which requires that disputes over the Contract must be made the subject of abitration does not preclude this Court from deciding the issue of the validity of the Addendum either.

The grievance procedure in this Contract relates to grievances from the interpretation of the Contract. Now, I recognize the relationship of the parties is bound up in this Contract and that the contacts between the parties, all contacts, have some relationship to this Agreement. But, in determining whether this Addendum is correct or not I don't think that is the type of issue that requires arbitration under Article VI of this Contract. I think that to determine whether or not the Addendum is proper or not requires this Court to look at and construe Article XXIX which is the Reopener and it is my view that the provision of the first sentence which reads, "should the Employer elect to go to an advance sell-system" clearly indicates to me that the parties (p. 144) contemplated that the Employer might, within the terms of the Agreement, go to a pre-sale and advance sell-system and it is my judgement and my view that the fact that they did so did not violate this Contract.

Now, the next question is did the fact that they properly went to an advance sell-system give them the right to do the rest of the things that they did? It is my finding that it did not. The parties in Article XXIX have a Reopener Clause which gives the parties the right to reopen in two issues: One, the method of compensa-

tion on the route sales-people and secondly, which new employees, and I want to emphasize the word "new", which new employee positions, if any, created by the advance sell-system should be included within the term of or as "employees" under this Agreement.

Now, it is my view that when the parties reopened this Contract on those two issues that the fact of reopening did not wipe out the contract. The Contract that the parties had entered into is still effective. It is still valid. It is my opinion also that the fact that there was an impasse did not wipe out the Contract and I reject the position of the defendant that the fact that the Reopener provision provides that the parties can either strike or lockout is evidence that the parties intended that an impasse would wipe out the provisions of (p. 145) the Contract as it relates to the compensation of the route people.

And the reason I reach that position is this: Article XX relates not only to strikes but also to lockouts. When the impasse was reached the parties here had three options in total: First, when they didn't reach agreement the Union could strike. They weren't obligated to do so. The other thing that could happen is that the Employer could lock out the people and say, "If you don't agree, we are going to lock you out." They were not required to do that. The third thing they could do is what did happen. They didn't have either a strike or lockout, but elected to go on and fight the battle here.

It is my view and judgment that the action of the defendant in unilaterally changing the compensation of

the route sales-people, as set out in this Addendum, violated the Contract. Now, it is my opinion further that this period for which the parties are going to be faced with determining a remedy is limited to the period from July 20th to the end of the Contract. Now, the parties entered into a new Contract voluntarily as of January 1st, 1983. I don't know that if either party would suggest that, "If we had known, Judge, how you were gong to rule, we would have entered into a different (p. 146) contract." But, let me say in advance that that position is not, in my opinion, valid. The parties fought out this battle on a rather limited period of time and any remedy will be limited and must be limited to that period of time.

The parties indicated to me in the pretrial and in your memorandums that you would be able to work out the nature or the extent of the remedy. I'm going to inquire of each of you, how long do you think that process is going to take? How much time do you want?

MR. WEINBERG: Within 30 days.

MR. ROZMARIN. Your Honor, I don't know that 30 days will be ample. I'm not even certain what would be entailed in the accounting and the negotiation of a formula to be applied. I think 60 days might be a more logical time frame. I might wish to consult with my client in that respect.

(Off the record discussion)

MR. ROZMARIN: Perhaps we could have a 60 day period in which to report to you and, if it looks like

that is not ample time, I'm sure it could be extended. What we do want, of course, is the Court to retain jurisdiction and not allow a final order to be entered until we get to the point of the resolution of damages for purposes of appeal or otherwise.

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

CIV 82-0-256

GENERAL DRIVERS AND HELPERS UNION, LOCAL NO. 554, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Plaintiffs,

-vs-

MID-CONTINENT BOTTLERS, INC., (Omaha Division), an Iowa Corporation,

Defendant.

APPEARANCES:

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MEMORANDUM OPINION

(Filed July 31, 1984)

Trial of the liability and remedy portions of this action were bifurcated, with the liability portion having been tried on March 6, 1984. The Court found for the plaintiff on the issue of liability, for the reasons stated on the record at the conclusion of the liability trial.

The remedy portion of the trial was tried on July 27, 1984. I find that the plaintiff is entitled to judgment against the defendant for $98,774.84, computed as wages due drivers of $95,274.84, and auditing costs of $3,500.00.

The route salespersons were compensated on a per-case basis under the labor contract sued on. When defendant instituted a pre-sell program, nine route salespersons had their wages substantially reduced on the basis that their jobs had been changed and reduced in scope.

Defendant argues that the apples changed to oranges, but I disagree. I believe what had been large, Delicious apples turned into medium-sized, Winesap apples. Exhibit 1 recaps the lost income to the drivers at $95,274.84, and plaintiff is entitled to recover this amount.

Plaintiff also seeks to recover attorneys fees of $9,375.00 based on 125 hours of work at $75 per hour. Attorneys fees incurred in bringing a § 301 action do not arise to the status of compensatory damages. *Cronin v. Sears, Roebuck & Co.*, 588 F. 2d (8th Cir. 1978). While the defendant breached the contract, the evidence would not support a finding that it did so in bad faith, vexatiously, wantonly or for oppressive reasons.

I conclude that the expenses of auditing the records to determine the amount of damages would constitute proper compensatory damages. The evidence established this cost at between $3,500 and $4,500, and I will adopt the lesser of the two figures.

The Clerk of Courts is directed to enter judgment for the plaintiff in the amount of $98,774.84, and the plaintiff is entitled to recover its taxable costs herein.

Dated this 30th day of July, 1984.

BY THE COURT:

/s/ JOHN B. JONES
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 82-0-256

GENERAL DRIVERS AND HELPERS UNION, LOCAL NO. 554, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Plaintiffs,

-vs-

MID-CONTINENT BOTTLERS, INC., (Omaha Division), an Iowa Corporation,

Defendant.

JUDGMENT

(Filed July 31, 1984)

This action came on for trial before the Court, The Honorable John B. Jones, Judge, presiding, and the issues having been duly tried and the Court having duly rendered its decision.

IT IS ORDERED AND ADJUDGED that the Plaintiff, General Drivers and Helpers Union, Local No. 554, affilated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, recover form the Defendant, Mid-Continent Bottlers, Inc., the sum of Ninety Eight Thousand Seven Hundred Seventy Four Dollars and Eighty-four Cents ($98,774.84), with interest thereon at the date of twelve point seventeen per cent per annum, and taxable costs of this action.

Dated at Omaha, Nebraska, this 31st day of July, 1984.

WILLIAM L. OLSON
Clerk of the Court
By /s/ PATRICIA K. KIMBALL
Deputy Clerk

APPENDIX C

AGREEMENT

This Agreement, made and entered into the 1st day of January, 1980, by and between:

MID-CONTINENT BOTTLERS, Inc. (Omaha Division)

hereinafter referred to as the "Employer", and General Drivers and Helpers, Local #554, or Successor, of Omaha, Nebraska, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter designated as the "Union".

WHEREAS, both parties are desirious of preventing strikes and lockouts and other cessations of work and employment; and of maintaining a uniform wage scale, working conditions and hours of the employees of the Employer, and of facilitating peaceful adjustment of all grievances which may arise from time to time between the Employer and his Employees; and of promoting and improving peaceful industrial and economic relations between the parties.

WITNESSETH:

ARTICLE I

RECOGNITION

Section 1. The Employer agrees to recognize and does hereby recognize the Union, its Agents, Representatives, or Successors, as the exclusive bargaining agency for all of the employees of the Employer as herein defined.

Section 2. The Employer agrees not to enter into any agreement with another labor organization during the life of this Agreement with respect to the employees covered by this Agreement; or any agreement or contract with said employees, individually or collectively, which in any way conflicts with the terms or provisions of this Agreement, or which in any way affects wages, hours, or working conditions of said employees, or any individual employee, or which in any way may be considered a proper subject for collective bargaining. Any such agreement shall be null and void.

Section 3. The Employer agrees not to hire any outside agency to do work covered by any classification in this Agreement for a lower rate of pay than called for in this Agreement.

Section 4. The Employer agrees that it will not interfere with, restrain, coerce, or discriminate against any of its employees in connection with their membership in the Union.

Section 5. In the event the Nebraska Labor Laws and the Taft-Hartley Act or either of them, pertaining to Union Security be repealed or amended to permit a Union Security clause, then this Article shall be open for immediate negotiations to include therein a Union Security clause that may be agreed upon by the parties.

Section 6. The term "Employee" as used in this Agreement shall include all Route Salespersons, Syrup Mixer, Filled Operators, Production, Warehouse and Main-

tenance Employees, Cooler and Vender Employees, and Office Employees, Mechanics and Mechanics Helpers and Working Foreperson of the Employer working at the Employer's plant in Omaha, Nebraska, unless specifically excepted by another provision of this Agreement.

Section 7. The Employer agrees that it will not direct or require their employees or persons other than the employees in the bargaining units here involved, to perform work which is recognized as the work of the employee in said units, except in the case of emergency.

ARTICLE II

TRANSFER OF COMPANY TITLE OR INTEREST

This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation or any part thereof is sold, leased, transferred or taken over by sale, transfer, lease, assignment, receivership or bankruptcy proceeding, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof. It is understood by this section that the parties hereto shall not use any leasing device to a third party to evade this Contract. The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, lesee, assignee, etc. of the operation covered by the Agreement or any part thereof. Such notice shall be in writing, with a copy to the Union not later that the effective date of the sale.

ARTICLE III

CHECK-OFF

The Employer agrees to deduct from the pay of all employees covered by this Agreement, dues, initiation fees and assessments of the Local Union having jurisdiction over such employees and agrees to remit to said Local Union all such deductions. Where law requires a written authorization by the employee, the same is to be furnished in the form required. No deduction shall be made which is prohibited by applicable law. Check-off procedures and times shall be worked out locally.

The Union shall indemnify, defend and save the Employer harmless against any and all claims, demands, suits or other form of liability that shall rise out of or by reason of action taken by the Employer in reliance upon payroll deductions, authorization cards or certified lists submitted by the Union to the Employer.

ARTICLE IV

WAGES

Attached hereto are schedules showing the classification and wage rates of the employees covered by this Agreement. Said schedules further set forth other details of employment. It is mutually agreed that said schedules and the contents thereof shall constitute a part of this Agreement.

ARTICLE V

HIRING — DISCHARGE

Section 1. No employee, except during the first sixty (60) days of employment, shall be discharged without just

cause and unless given at least one (1) warning notice against such employee, in writing and a copy to the Union and the Union Steward, except that no warning notice need to be given to an employee before the employee is discharged if the cause of such discharge is and of the following:

A. Dishonesty.

B. Consuming intoxicants while on duty.

C. Reporting to work under the influence of drugs or consumption of drugs on the job, other than under a doctor's prescription, sale or distribution of drugs (drugs as used herein includes marijuana).

D. Causing injury to a fellow employee through deliberate action or gross negligence.

E. Recklessness resulting in a serious accident while on duty.

F. Carrying of unauthorized passengers.

It is recognized that the Employer at its option may at any time temporarily suspend rather than discharge an employee.

Section 2. A warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of such notice. Any appeal from discharge or suspension shall be made pursuant to the Grievance Procedure set forth in this Agreement.

Section 3. Should such an investigation prove that an injustice has been done an employee, he or she shall be reinstated and compensated at his or her usual rate of pay while he or she has been out of work, including commissions.

Section 4. It is agreed, however, that in the hiring of a new employee who had had not less than six (6)

months' experience in the same line within two (2) years, that the said new employee shall be started by the Employer on the basis of the wage of any new employee with the experience as above stated, the same as though the new employee has been employed by the Employer the time specified above.

Section 5. The management of the plant, the direction of the working forces, the distribution of products, the establishment of reasonable dules and regulations for the conduct of the employees, the enforcement thereof and the supervision of the work and the right to hire, promote and transfer shall remain the exclusive function of the Employer, subject, however, to the terms of this Agreement.

Section 6. The Employer shall give the Local Union a list of the probationary employees hired and/or discharged prior to the expiration of the trial period at least once in each sixty (60) day period. This list shall also contain addresses and dates of hiring, as well as classification of work.

Section 7. The Employer will provide employment, training, compensation and other conditions of employment without regard for race, color, religion, national origin, sex or age, except where age or sex are bona fide occupational requirements.

ARTICLE VI

GRIEVANCE PROCEDURE AND ARBITRATION

Any controvery arising over the interpretation of, or adherence to, the terms or provisions of this Agreement

shall be settled by negotiations between the Union and the Employer. Any grievance must be presented to the Employer within seven (7) working days after occurrence of the event giving rise to the grievance, or it shall be considered waived. Such controversy may be referred to arbitration. In such event the parties shall first attempt to agree upon an impartial arbitrator. If they connot agree within five (5) working days, the parties shall jointly request Federal Mediation and Conciliation Service to submit a list of five (5) names of possible arbitrators.

Within one (1) week after receipt of the panel of arbitrators, the parties shall meet to select the arbitrator. The parties shall each strike two names from the panel, and the remaining name shall be the arbitrator. The decision of the arbitrator shall be final and binding on the Union and Employer in any controversy so submitted. The fee of the Arbitrator and other necessary expense incurred in connection with the arbitration, other than expenses incurred on their own behalf by the respective parties, shall be shared equally by the parties.

ARTICLE VII

STEWARDS

Section 1. The Employer recognizes the right of the Union to designate job stewards and alternates, such stewards and/or alternates to be employees of the Employer. The authority of job stewards and/or alternates so designed by the Union shall not exceed the following duties and activities:

A. The investigation and presentation of grievances in accordance with the provisions of this Agree ment.

B. The collection of dues when authorized by appropriate Union action.

C. The transmission of such messages and information which shall originate with and authorized by the Union or its officers, provided such messages and information.

(1) Have been reduced to writing, or

(2) If not reduced to writing, are of a routine nature and do not involve work stoppages, slow-downs, refusals to handle goods or any other interference with the Employer's business.

Job stewards and/or alternates have no authority to take strike action or any other action interrupting the Employer's business except as authorized by official action of the Union.

The Employer recognizes these limitations upon the authority of job stewards and their alternates and shall not hold the Union liable for any unauthorized acts. The Employer in so recognizing such limitations, shall have the authority to impose proper discipline, including discharge, without recourse, in the event the job steward and/or alternate has taken unauthorized strike action, slow-down, or work stoppage, in violation of this Agreement.

Section 2. In all cases where employees must leave their work in order to perform their duties as a job steward or alternate, they shall request permission from their supervisor before leaving their job and shall report to their supervisor upton returning to their job.

ARTICLE VIII

SENIORITY

Section 1. Departmental senority shall prevail at all times, based upon the following departmental categories:

A. Route Sales — Route Salespersons

B. Production — Syrup Mixer, Filled Operator, other Production employees, and Maintenance and Production Mechanics.

C. Warehouse — Truck Mechanics and Mechanic's Helpers and Warehouse employees.

D. Vendor — Vendor Serviceperson and Helper

E. Office Employees

Section 2. Seniority rights shall be determined by length of service within a department.

Section 3. Any new employee shall be on probation for the first sixty (60) days. An employee retained after the probationary period shall be placed on the regular seniority list as of the date of his or her original hiring.

Section 4. In the event that it becomes necessary to reduce the number of employees within a department, the Employer shall lay off employees in accordance with their seniority. Employees so laid off shall be reinstated on the basis of their departmental seniority.

Section 5. The positions of working foreperson in any department, syrup mixer and filled operator and checker, and computer operator shall be exempt from bidding, and Employer may fill vacancies in these positions from any source.

Section 6. An employee's seniority with the Employer shall be broken and terminated when the employee:

(a) quits; (b) is discharged for cause; (c) overstays an authorized leave of absence. Any employee's seniority shall then start anew upon re-employment. In the case of lay-off, there shall be no break in departmental seniority and all departmental seniority rights established shall be maintained if rehired to the same department, but not if rehired to a different department.

Section 7. Vacancies of jobs or routes now established, or new jobs or routes added except as exempted under Section 5, are to be filled on the basis of departmental seniority and qualification for the job among employees bidding for such job. Jobs shall be posted on the bulletin board for seventy two (72) hours, within one (1) week after such availability occurs, for bidding by eligible employees.

Employees successfully bidding a job according to the seniority provision shall start the job no later than the following Monday.

Section 8. Except as otherwise provided in this Agreement, the Employer may make transfer within and between departments. If after such transfers a job opening remains in the production or warehouse department, such job will be filled on the basis of seniority and qualification for the job among production or warehouse employees applying for the job, first from within the department in which the job exists (either warehouse or production). There shall be no bidding between departments

Section 9. Route Salespersons must have six (6) months' seniority with the Employer before they shall be eligible to bid on an open or new route. Once a salesperson is assigned a route, after bidding, such salesperson

will not be eligible to bid on another route for six (6) months.

The Employer must inform a route salesperson with less than one year seniority, that if he or she bids a route he or she may not bid for another six (6) months. The steward shall initial each bid prior to it being awarded.

Section 10. If a vacancy occurs while an employee is absent on vacation or any other approved absence, such employee shall be eligible to bid on the open job or route within forty eight (48) hours after returning from such absence. Any assignment of an open job or route while an employee is unavailable because of such absence shall be on a temporary basis until such employee has had an opportunity to submit a bid as stated above.

Section 11. Whenever a sales route is open under the seniority rules, only three (3) changes will be permitted.

ARTICLE IX

HOURS

Section 1. Route Salespersons

(a) The starting time for route salespersons shall be between 6:00 a.m. and 8:00 a.m., as fixed by the Employer.

(b) The working hours of salespersons are not fixed. They may return to the plant upon full completion of their daily route, including making all stops. No salesperson shall be required to make a delivery to a customer after fully completing his or her route and making a call-in from his or her last stop to check the telephone call book prior to leaving his or her route.

(c) The basic work week shall be five (5) days, Monday through Friday, (excluding the weeks listed below). The basic work week shall be five (5) days, Monday through Saturday, during the six (6) recognized holiday weeks.

(d) When the Christmas holiday falls on Monday, Tuesday or Wednesday, the basic work week shall be six (6)) days, Monday through Saturday, for the week preceeding the Christmas holiday.

(e) No route salesperson shall be required to work Saturday, other than those specified above. If there are cases to be delivered on Saturday, other than those specified above, as a result of advertised promotions, or to service special accounts, such Saturday shall be first be offered to the regular route salesperson. Should he or she decline to work such Saturday, the work will be offered to others by seniority. If no one agrees to the Saturday work, and it is performed by management, no commission will be paid. There will be minimum one hundred (100) case guarantee for such Saturday work. If more than thirty (30) cases are left, over and above regular store inventory at the end of the promotion, the regular route salesperson shall receive commission for any excess from the promotion that is not picked up. Any excess above the thirty (30) cases picked up or retained will be deducted from the deliverer. Any such excess shall be reported to management on the day of the route salesperson's first call on the account after the promotion is ended. Notice shall be given for such Saturday, no later than the preceeding Wednesday morning.

(f) No route salesperson, after he has returned to the plant will be required to sort any bottles by brand.

Section 2. Inside Employees

(a) Subject to availability of work and in accordance with seniority, a guaranteed standard work week of forty (40) hours shall prevail. Hours worked in any one (1) day shall be consecutive and those in excess of eight (8) hours, exclusive of lunch periods, shall be at the rate of one and one-half (1½) the regular hourly rate for all actual time worked. On work days, the starting time shall be as determined by the Employer except employees on the bottling line, whose starting time shall not be later than 8:00 a.m Any work in excess of forty (40) hours in any week shall be paid at the rate of one and one-half (1½) the employee's regular rate.

(b) In the event that the employee is required to report on Saturday or Sunday he or she shall be guaranteed a minimum of four (4) hours of work. All work performed on Saturday shall be paid for at the rate of time and one-half (1½) the employees rate. Overtime shall not be pyramided on overtime. All work performed on Sunday will be paid at the rate of double time.

(c) Employees shall be notified no later than 12:00 o'clock noon when overtime is scheduled, except when the conditions creating the need for overtime develop after 12:00 o'clock noon, or in case of emergency.

One day notice when required to work on Saturday, Sunday or holiday, except when the conditions creating the need for such work develop on the day before or in case of emergency.

ARTICLE X

MAINTENANCE OF STANDARDS

Section 1. The Employer agrees that all conditions of employment relating to wages, hours or work, over-time

differentials and general working conditions shall be maintained at no less than the highest minimum standards in effect at the time of the signing of this Agreement.

Section 2. It is agreed that the provisions of this Section shall not apply to inadvertent or bona fide errors made by the Employer or the Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from the date of error. No other Employer shall be bound by the voluntary acts of another Employer when he may exceed the terms of this Agreement.

ARTICLE XI

ROUTE SPLITS

The Employer shall have the right from time to time to allot to and change, extend or split up the routes of the route salesperson. In event of such split, the salesperson shall be guaranteed that his or her commissions from case sales established during the twenty-six (26) weeks preceding such split shall not be decreased during the sixteen (16) week period immediately following such split. Settlement for any decreased commissions shall be made at the end of the sixteen (16) week period for which such guarantee is in effect. This guarantee shall not apply to any product or package the sales or distribution of which are discontinued.

ARTICLE XII

NEW OPERATIONS

In the event any new job or job classifications are created in the general area covered by the provisions of

this Contract, the Employer will enter into negotiations with the Union for the purpose of determining the wages, classifications and other conditions prior to the institution of such operation. (In the event the parties cannot agree, the matter shall be subject to the Grievance Procedure provided in Article VI.)

ARTICLE XIII

HOLIDAYS

Section 1.

(a) Employees covered by this Agreement shall not be required to work on Sundays, or the following holidays:

New Year's Day	Labor Day
Decoration Day	Thanksgiving Day
Fourth of July	Christmas Day

(b) In addition to the foregoing six (6) holidays, all employees will be entitled to a seventh (7th) holiday for the employee's birthday, provided that such employee has been in the employ of the Employer for one (1) year or more. Such holiday shall be taken on a day chosen by the Employee which shall be within seven (7) days before or seven (7) days after such employee's birthday, or on such other day as may be mutually agreed upon by the employer and employee.

Section 2. Holidays not worked shall be considered as a day's work for the purpose of computing overtime in the week in which the holiday occurs, and in no case shall any employee be required to make up hours lost due to a holiday week.

Section 3. All hourly paid employees covered by this Agreement shall have eight (8) hours pay for each of the

above mentioned holidays based on straight time hourly rate.

Section 4. All salespersons shall receive as holiday pay Forty dollars ($40.00) per holiday during the term of this Agreement. This includes birthday.

Section 5. If an emergency arises and an employee is required to work on any of the above holidays, he or she shall receive an additional day's day at the time and one-half (1½) hourly classification rate.

Section 6. If an emergency arises and an employee is required to report for work, (other than a regular scheduled work day or holiday) such employee shall be paid at the rate of time and one-half (1½) the hourly rate for such time worked, and shall be guaranteed four (4) hours' pay per start.

Section 7. If an emergency arises and an employee is required to report for work on Sunday, such employee shall be paid two (2) times the hourly rate for such time worked, and shall be guaranteed four (4) hours' pay per start.

Section 8. If any of the above named holidays fall within the employee's vacation, the Employer will grant the employee, at the discretion of management, a day off during the calendar year or a day's pay in lieu thereof.

Section 9. If any of the above mentioned holidays occur during the first thirty (30) days while a regular employee shall be on a bona fide sick leave, such employee shall receive the holiday pay for the holiday, or holidays, above named.

Section 10. All regular employees shall be granted holiday pay, for the holidays above named, whenever such employee suffers an injury on the job, provided such pay shall be received only for the holidays which occur during a ninety (90) day period from the date of injury.

ARTICLE XIV

VACATIONS

Section 1. Employees who have been in the continuous employment of the Employer for one (1) year shall be entitled to and take one (1) weeks' annual vacation with pay. Employees who have been in the continuous employment of the Employer for two (2) years shall be entitled to take two (2) weeks' annual vacation with pay. Employees who have been in the continuous employment of the Employer for eight (8) years shall be entitled to and take three (3) weeks' annual vacation with pay. Employees who have been in the continuous employment of the Employer for fifteen (15) years shall be entitled to and take four (4) weeks' annual vacation with pay.

Section 2. Employee, upon the giving of a reasonable notice of not less than one (1) week to his Employer, shall be given his vacation pay before starting on his earned vacation.

Section 3. Vacation pay for route salespersons shall be based upon one fifty-second (1/52nd) of the route salesperson's earnings for the previous calendar year for each week of vacation earned, or the earnings of the route for the vacation week taken, or a prorated portion of the monthly guarantee, whichever is greater.

Section 4. Vacation shall not be accumulative and employees cannot waive vacations and draw double pay in lieu thereof.

Section 5. The Employer shall post a vacation list on or about February 1st. During the week following such posting, the top 25% seniority employees shall select their period of vacation. In succeeding weeks the second 25%, third 25% and the bottom 25% shall select their vacations so that selections are completed by March 1. Should an employee fail to make a selection of vacation period by March 1, he shall waive seniority rights and the Employer shall assign vacation. The Employer shall leave the vacation list up so it may be seen for twelve months.

Section 6. No more than three (3) route salespersons may bid and take their vacation during the same week of vacation.

Section 7. No more than two (2) production employees may take their vacation during the same week of vacation. No more than two (2) warehouse employees may take their vacation during the same week of vacation. No more than one (1) office employee may take their vacation during the same week of vacation.

Section 8. Vacation pay for hourly employees shall be based upon one fifty-second (1/52nd) of the employee's earnings for the previous calendar year for each week of vacation earned, or forty (40) hours at the straight-time, hourly rate for each week of vacation earned, whichever is greater.

Section 9. Except for employees discharged under ARTICLE V, SECTION 1, for any of the reasons specifically listed therein, each employee who has completed one

(1) full year of employment shall upon termination of his employment, receive the prorata share of vacation which he has earned for each completed month since the last anniversary date of employment.

ARTICLE XV

GENERAL

Section 1. When a route salesperson receives a check as payment from a customer, he or she shall not be held responsible for the validity or genuineness of such check or endorsements thereon. This shall not apply to two party checks or checks accepted from a customer after the Employer's instructions to the route salesperson not to accept checks from such customer. In those cases, the route salesperson shall be held responsible.

Section 2. The driver of a vehicle of the Employer shall allow no one on or in said vehicle who is not an employee of the Employer and on duty.

Section 3. Rather than in all cases to dispense with the services of such employees, when employees, by reason of age or physical or mental disability or limited ability, are unable to maintain production standards in the judgment of the Employer, such employees may be offered employment in some other work for the Employer which they can do, provided such work is available at a rate upon which the Employer and the Union may agree if such job is within the bargaining unit, and without regard to seniority.

Section 4. A route salesperson shall not be responsible for merchandise stolen from his truck, if the truck does

not have locks in good working order to protect the merchandise, and if the route salesperson promptly files a bona fide police report on the theft.

Section 5. In the event legislation is passed which would become effective in the State of Nebraska during the term of this Agreement banning the use of non-refillable cans or bottles or placing a deposit on same, either party to this Agreement may give thirty (30) days' notice to the other party that said contract be opened for the purpose of discussing wages, hours and/or working conditions for only those employees whose wages might be changed as the result of such legislation. If the parties do not agree, there shall be no strikes, lockouts or other legal or economic recourse exclusive of arbitration.

Section 6. The Employer shall furnish a monthly accountability statement on how route salespersons stand. Shortages shall work both ways.

Section 7. Any employee involved in any accident shall immediately report said accident and any substantial injuries sustained. When required by Employer, the employee, before starting his next shift, shall make out an accident report in writing on forms furnished by the Employer and shall turn in all available names and addresses of witnesses to the accident. Failure to comply with this provision shall subject such employee to disciplinary action by the Employer.

ARTICLE XVI

UNIFORMS

Section 1. Plant Employees: Where the Employer requires a uniform be worn, same shall be paid for by the

Employer. Said uniform shall be the property of the Employer and upon termination of services of the employee, the employee shall return, cleaned, the last complete issue of both summer and winter uniforms. All uniforms shall bear the Union label.

Section 2. Route Salespersons: Route salespersons, covered by this Agreement, when required to do so, shall wear uniforms selected by the Employer, which shall not be worn at places which would bring reproach upon the Employer and/or route salesperson.

Section 3. The Employer agrees to pay the full cost of such uniforms, and the uniforms shall remain the property of the Employer, and upon termination, the route salesperson shall return, cleaned, the last complete issue of summer and winter uniforms.

Section 4. The route salesperson shall wear clean uniforms at all times. It is the sole responsibility of the route salesperson to launder and clean the uniforms they wear.

Section 5. A committee shall be selected of equal numbers between the Employer and the employees to explain any questions in regard to uniforms.

ARTICLE XVII

SICK LEAVE

Section 1. Seniority shall not be forfeited by a bona fide illness or injury provided that absence by reason thereof is supported by medical certificate and does not extend over (1) year in duration. Should the duration of such bona fide illness or injury, supported by a medical

certificate, extend over one (1) year in duration, the vacated job shall be filled, but any such absent employee will not lose seniority when he subsequently returns to work. While on sick leave, an employee shall not accumulate additional sick leave.

Section 2. Employees shall be entitled to sick leave after they have been regularly employed by the Company for six (6) months. After six (6) months, they shall be entitled to three (3) days sick leave with pay. The basis for sick leave pay for hourly-paid employees shall be eight (8) hours at the straight-time rate for each day of sick leave. The basis for sick leave pay for route salespersons shall be Forty-four dollars ($44.00) per day during 1980 and Forty-six dollars ($46.00) per day during 1981, and Forty-eight dollars ($48.00) per day during 1982, or the earnings of the route, whichever is greater. On each succeeding six (6) months anniversary of their employment, they shall become eligible for an additional three (3) days sick leave.

Section 3. There shall be no maximum limit on the time an employee may accumulate sick leave. Should an employee's absence because of sickness exceed the period of sick leave granted, the Employer, upon request of the employee, may elect to grant additional sick leave pay in lieu of vacation pay if the employee shall be entitled to vacation pay under the terms of this Agreement.

Section 4. Sick leave pay shall begin on the second day of an employee's absence, provided, however, that in the case of (a) accidental injury substantiated by a doctor's certificate, or (b) employees who have been in the continuous employ of the Employer for two (2) years or more, sick leave pay shall begin on the first day's absence.

Section 5. In all cases, sick leave shall be paid in conjunction with Workmen's Compensation. In no event shall sick leave be paid in conjunction with Work-Compensation and/or weekly Sickness and Accident Insurance benefits in an amount which in combination would exceed the amount the employee would have earned. For purposes of calculation sick leave under this section only, will be rounded to the nearest quarter day and sick leave not used under this Section shall be accumulated.

Section 6. The Employer will pay the Employer's cost of all fringe benefits now existing for the first thirty (30) days absence, except where there is an on-the-job injury, in which case, the Employer will pay the Employer's cost of such fringe benefits until the employee returns to work, but in no event for a period exceeding twelve (12) months.

ARTICLE XVIII

ABSENCE

Section 1. The Employer agrees to grant the necessary and reasonable time off, without discrimination or loss of seniority rights and without pay, to any employee designated by the Union to attend a labor convention or serve in any capacity on other official Union business, provided forty eight (48) hours' written notice is given to the Employer by the Union, specifying length of time off. The Union agrees that, in making its request for time off for Union activities, there shall be due consideration given to the number of men or women affected in order that there shall be no disruption of the Employer's operations due to lack of available employees.

Section 2. Any employee desiring leave of absence from his or her employment shall secure written permission from both the Local Union and Employer. The maximum leave of absence shall be for thirty (30) days and may be extended for like periods. Permission for extension must be secured from both the Local Union and Employer. During the period of absence, the employee shall not engage in gainful employment in the same industry in classifications covered by this Contract. Failure to comply with this provision shall result in the complete loss of seniority rights for the employees involved. Inability to work because of proven illness or injury shall not result in the loss of seniority rights.

Section 3. If an employee is granted a leave of absence, as provided in Section 2, above, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the cost of Non-Occupational Employee Benefit Plan during the period of absence.

ARTICLE XIX

LIMITATIONS OR RIGHTS AUTHORITY AND LIABILITY

Section 1. No employee, Union member or other agent of the Union shall be empowered to call or cause any strike, work stoppage or cessation of employment of any kind whatsoever without the express approval of the Business Representative or the Secretary-Treasurer of the Local Union. The Union shall not be liable for any such activities unless expressly so authorized.

Section 2. Any individual employee or group of employees who willfully violate or disregard the arbitration and grievance procedure set forth in Article VI of this Agreement, may be summarily discharged by the Employer without liability on the part of the Employer or the Union.

ARTICLE XX
NO STRIKE NO LOCKOUT

Section 1. The Union and Employer agree that during the term of the Agreement there shall be no strike or lockouts.

Section 2. Picket Line: It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action, in the event an employee refuses to enter upon any property involved in a lawful primary labor dispute, or refuses to go through or work behind any lawful primary picket line, including the lawful primary picket line of Unions party to this Agreement, and including lawful primary picket lines at the Employer's place of business.

Section 3. Struck Goods: It shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to perform any service which his or her Employer undertakes to perform for an Employer or person whose employees are on strike, and which service, but for such strike, would be performed by the employees of the Employer or person on strike.

Section 4. Grievances: Within five (5) working days of filing of grievance claiming violation of this Article,

the parties to this Agreement shall proceed to the final step of Article VI — Grievance Procedure and Arbitration —, without taking any intermediate steps, any other provision of this Agreement to the contrary notwithstanding.

ARTICLE XXI

BONDS

Section 1. Should the Employer require any employee to give bond, cash bond shall not be compulsory, and any premium involved shall be paid by the Employer.

Section 2. The primary obligation to procure the bond shall be on the Employer. If the Employer cannot arrange for a bond within thirty (30) days, he must so notify the employee in writing. Failure to so notify shall relieve the employee of the bonding requirement. If proper notice is given, the employee shall be allowed twenty (20) days from the date of such notice to make his or her own bonding arrangements, standard premiums only on said bond to be paid by the Employer. A standard premium shall be that premium paid by the Employer for bonds applicable to all other of its employees in similar classifications.

Section 3. Any excess premium are to be paid by the employee. Cancellation of a bond after once issued shall not be cause for discharge, unless the bond is cancelled for cause which occurs during working hours, or due to the employee having given fraudulent statement in obtaining said bond.

ARTICLE XXII

MILITARY SERVICE

Any employee on the seniority list inducted into Military, Naval, Marine or Air Service under the provisions of any Federal Selective Service Training Statute and amendments thereto, or any similar act in time of National Emergency respectively, shall, upon termination of such service, be re-employed in line with his seniority, at the then current rate for such work, provided he or she has not been dishonorably discharged from such service with the United States Government and is physically able to do work available, and further, provided he or she reports for work within ninety (90) days of the date he or she is discharged from such service with the United States Government.

ARTICLE XXIII

RECORDS

Section 1. The Employer shall make available to an authorized representative of the Union for inspection at the plant any and all records necessary to settle a dispute provided such records shall apply only to salary, wages, or hours of an employee under this Agreement.

Section 2. Authorized representatives of the union shall have access to the Employer's plant during working hours for the purpose of adjusting disputes and ascertaining that the Agreement is being adhered to, provided however, that there is no interruption of the Employer's work schedule, and that the Union representatives first reported to the Plant Manager's office.

ARTICLE XXIV

SEPARABILITY AND SAVINGS CLAUSE

Section 1. If any Article or Section of this Contract or of any Riders thereto should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any Article or Section should be restrained by such tribunal pending a final determination as to its validity, the remainder of this Contract and of any Rider thereto, or the application of such Article or Section to persons or circumstances other than those as to which it has been held invalid or as to which compliance with or enforcement of has been restrained, shall not be affected thereby.

Section 2. In the event that any Article or Section is held invalid or enforcement of or compliance with which has been restrained, as above set forth, the parties affected thereby shall enter into immediate collective bargaining negotiations, upon the request of the Employer or the Union, for the purpose of arriving at a mutually satisfactory replacement for such Article or Section during the period of invalidity or restraint. If the parties do not agree on a mutually satisfactory replacement, either party shall be permitted all legal or economic recourse in support of its demands notwithstanding any provision in this Contract to the contrary.

ARTICLE XXV

TOOLS

The Employer will furnish all tools necessary to perform work on any equipment or material.

ARTICLE XXVI

FUNERAL LEAVE

In the event of the death of Father, Mother, Spouse, Brother, Sister, Child, Mother-in-Law, Father-in-Law, Son-in-Law, Daughter-in-Law, Brother-in-Law, Sister-in-Law, Grandparents or Grandchild of an employee, the employee shall be entitled to be absent from work for a period of not more than three (3) regular working days when such absence is necessary to make arrangements for and to attend the funeral. During such absence, the employee shall be compensated at his or her regular rate of pay for regular time lost. Such absentee compensation shall not include pay for loss of overtime, vacation time or premium pay.

ARTICLE XXVII

JURY OR ELECTION DUTY

Regular full time employees serving on jury duty or election duty shall receive their classified rate of pay for scheduled hours of work they are required to be absent from their job, less any fees they may receive as defined by law for jury service or election service during the period of time they actually serve as a jurist or election board member. They shall report for work promptly at the end of said jury or election service. They shall present an order requiring such service to their supervisor. The above loss of pay provision shall not apply if the employee volunteers for said jury or election duty service.

ARTICLE XXVIII

COST OF LIVING

Section 1. All hourly paid employees covered by this Agreement except bottlesorters newly employed after 1/1/80, shall be covered by the provisions for a cost-of-living allowance as set forth in this Article.

Section 2. The amount of the cost-of-living allowance shall be determined and redetermined as provided below on the basis of the Revised Index for Urban Wage Earners and Clerical Workers (All Items), published by the Bureau of Labor Statistics, U.S. Department of Labor "1967-100", and referred to herein as the "Index".

Section 3. The cost of living allowance under this Agreement shall be due as outlined, using the following schedule:

(a) With 12-1-80 as a base figure, the first allowance is to be paid April 1, 1981, or when the figures are available for December 1980, January and February 1981.

(b) The second allowance is to be paid July 1, 1981, or when the figures are available for March, April and May, 1981.

(c) The third allowance is to be paid October 1, 1981, or when the figures are available for June, July and August, 1981.

(d) The fourth allowance is to be paid January 1, 1982, or when the figures are available for September, October and November, 1981.

(e) With 12-1-81 as a new base figure, the same schedule for the fifth, sixth, seventh and eighth allowances to be paid shall follow the above schedule, except for the dates.

Section 4. The cost-of-living allowance due at the beginning of each three (3) month period during this Agreement shall be based on the difference between the Index figure of the preceding three months Index figure.

Section 5. A one-cent (1¢) per hour cost-of-living adjustment shall be made for each full .4 point increase or decrease in the cost-of-living as determined by the procedure set out in the above paragraph.

Section 6. There shall be a maximum 12¢ adjustment in the second year of this Agreement. There shall be a maximum 12¢ adjustment in the third year of this Agreement.

Section 7. Any increase required as a result of this Article shall be added to an employee's classification base rate, as set out in Schedule A. A decline in the Index shall not result in a reduction of classification base rates as set out in Schedule A.

Section 8. If the Index in its present form and calculated on the same basis shall be discontinued, then the parties shall negotiate a replacement for this clause.

Section 9. The cost-of-living allowance referred to herein, Sections 1-9, shall not be due and payable during the first year of this Agreement.

ARTICLE XXIX

REOPENER

The Employer may, at any time during the first 18 months of this contract, send the Union by certified mail a written sixty (60) days notice to reopen portions of this Agreement at the end of such 60 days should the Employer

elect to go to an advance sell-system. Such reopener shall be limited to the issues of: (a) a change in method of compensation under Schedule A(D) of this contract for employees currently classified as route salespersons who would continue to deliver product under an advance sale system, from commission to base rate plus commission, an hourly basis, or any other payment method determined by the Employer to be appropriate, (b) which new employee positions if any created by an advance sell system are to be included within the definition of Employee in Article I, Section 6 of this contract.

In the event the parties are unable to negotiate an agreement during the reopener, Article XX, Section 13 of this Agreement shall be inoperative until an agreement is reached.

ARTICLE XXX

TENURE OF AGREEMENT

This Agreement, together with the attached Schedule, shall be in full force and effect from January 1, 1980, to and including December 31, 1982, and shall continue in full force and effect from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to December 31, 1982, or December 31st of any subsequent contract year.

IN WITNESS WHEREOF, the parties hereto have herein below executed this Agreement on this — day of ————, 1980.

MID-CONTINENT INDUSTRIES, INC. (Mid-Continent Bottlers, Inc. Omaha, Division)	GENERAL DRIVERS & HELPERS UNION, LOCAL 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
/s/ By Dale R. Richardson	/s/ By Thomas C. McFarland TITLE Secretary Treasurer
TITLE V.P. - Gen. Mgr.	/s/ By Charles E. Hansen TITLE Business Representative

SCHEDULE A

A. *SALES DRIVERS*

Section 1. In the event the Employer introduces a new non beverage product which will be handled by route sales, the commission to be paid will be mutually agreed upon by Union and the Employer prior to the first delivery of the same.

Section 2. Commission shall be paid to route salespersons for all merchandise delivered on his or her route, except as otherwise provided under this Agreement.

Section 3. Returned merchandise will not be deducted from the commission of the route salesperson if the merchandise was ordered by a customer on the salesperson's route and delivered by someone other than the route salesperson.

Section 4. In the event a route salesperson is laid off, he or she shall be given two (2) week's notice of recall, mailed to his or her last known address. In the event the employee fails to be available for work at the end of said two weeks, he or she shall lose all seniority rights under this Agreement.

Section 5. If a salesperson is required to run his or her route on a day of funeral leave, he or she shall be compensated full commission or holiday pay, whichever is greater.

Section 6. Driver salespersons serving on jury or election duty shall be compensated full commission or holiday pay, whichever is greater, minus any fees earned for jury or election duty.

B. *INSURANCE*

During the life of this Agreement, the Employer agrees to keep in effect, without increased cost to the Employees, the now existing group health insurance program with the following improvements:

1. *Effective January 28, 1980*

   (a) For covered hospitalization started on or after such date, the maximum Daily Hospital Room Benefit shall be $105.00.

   (b) For any covered disabilities starting on or after such date, the weekly loss of time benefit shall be $75.00 per week.

   (c) For any covered expenses incurred on or after such date, the maximum for Major Medical expense benefits shall be $100,000.00.

   (d) For covered X-ray and laboratory expenses incurred on or after such date, the maximum payment shall be $85.00.

2. *Effective January 1, 1981*

   (a) For any covered disabilities starting on or after such date, the weekly loss of time benefit shall be $80.00 per week.

   (b) For covered hospitalization started on or after such date, the maximum Daily Hospital Room Benefit shall be $110.00 per day.

3. *Effective January 1, 1982*

(a) For any covered disabilities starting on or after such date, the weekly loss of time benefit shall be $85.00 per week.

(b) For any covered hospitalization started on or after such date, the maximum Daily Hospital Room Benefit shall be $115.00 per day.

C. *PENSION*

For employees covered by the Wage and Commission Pension Plan, the monthly pension benefit shall be increased to $6.00 per year of future service credited after March 1, 1977, up to a maximum of twenty-five (25) years service. The costs of this improvement shall be shared by the Employer and Employees on the same percentage contribution basis that is now being made to the pension plan by the Employer and Employees prior to its improvement.

D. *WAGES — SALES DRIVERS*

	Eff. 1/1/80	Eff. 1/1/81	Eff. 7/1/81	Eff. 1/1/82	Eff. 7/1/82
Refillables — per case	37¢	39¢	39½¢	41½¢	42¢
Non-refillables — per case	31½¢	33½¢	34¢	35¢	36½¢
Pre-Mix — per 5 gallon tank	60¢	65¢		70¢	
Post-Mix — per gallon	15¢	15¢		17¢	

For any empty non-refillable containers a route salesperson is required by the Employer to pick up and that he

or she does pick up and return, the route salesperson shall, during the term of this Agreement, receive 3¢ per case returned.

All route salespersons who have served in such capacity for sixty (60) days shall be guaranteed $750 per month during 1980, $775 per month during 1981, and $800 per month during $1982. During the term of this contract, route trainees shall be guaranteed $140 per week during the first thirty (30) days of employment and $150 per week during the second thirty (30) days of employment. Route trainees shall be guaranteed $160 per week after sixty (60) days of employment.

In addition to the regular commission payable above, route salespersons who have been in the permanent continuous employment of the Employer for three (3) years or more shall be entitled to an additional longevity commission of ½¢ per case on all refillable, non-refillable, premix and post-mix units sold.

E. *WAGE RATES — PRODUCTION*

Wages will be paid in accordance with the following hourly rates:

	Eff. 1/1/80	Eff. 1/1/81	Eff. 7/1/81	Eff. 1/1/82	Eff. 7/1/82
Working Foreperson	$6.07	$6.52	$6.57	$6.97	$7.02
Mechanic	6.14	6.59	6.64	7.04	7.09
Syrup Mixer & Filler Operator	5.97	6.42	6.47	6.87	6.92
General Production	5.89	6.34	6.39	6.79	6.84

F. *WAGE RATES — WAREHOUSE EMPLOYEES*

Wages will be paid in accordance with the following hourly rates:

	Eff. 1/1/80	Eff. 1/1/81	Eff. 7/1/81	Eff. 1/1/82	Eff. 7/1/82
Working Foreperson	$6.07	$6.52	$6.57	$6.97	$7.02
Truck Mechanic	6.34	6.79	6.84	7.24	7.29
Mechanic's Helper & Warehouse Employees	5.89	6.34	6.39	6.79	6.84
Bottlesorters employed on 1/1/80:					
1st 3 months	5.04	5.49	5.54	5.94	5.99
2nd 3 months	5.24	5.69	5.74	6.14	6.19
Over 6 months	5.44	5.89	5.94	6.34	6.39
Bottlesorters newly employed after 1/1/1980:					
1st 3 months	4.64	4.74		4.84	
2nd 3 months	4.84	4.94		5.04	
Over 6 months	5.04	5.14		5.24	

G. *WAGE RATES — VENDING EMPLOYEES*

Wages will be paid in accordance with the following hourly rates;

	Eff. 1/1/80	Eff. 1/1/81	Eff. 7/1/81	Eff. 1/1/82	Eff. 7/1/82
Working Foreperson	$6.09	$6.54	$6.59	$6.99	$7.04
Service Person	5.99	6.44	6.49	6.89	6.94
Helpers	5.94	6.39	6.44	6.84	6.89

H. *WAGE RATES — OFFICE EMPLOYEES*

Wages will be paid in accordance with the following hourly rates:

	Eff. 1/1/80	Eff. 1/1/81	Eff. 7/1/81	Eff. 1/1/82	Eff. 7/1/82
Class I —					
Posting Clerk; Keypunch; Receptionist Clerk	$5.62	$6.07	$6.12	$6.52	$6.57
Class II —					
Accounting Clerk; Lead Keypunch	5.67	6.12	6.17	6.57	6.62
Class III —					
Accountant; Computer Operator	5.92	6.37	6.42	6.82	6.87

1. *GENERAL*

(1) The starting rate for newly hired production employees shall be 15¢ per hours less than the regular rate for the first thirty (30) days of employment.

(2) The starting rate for newly hired warehouse employees, except bottle sorters shall be 15¢ per hour less than the regular rate for the first thirty (30) days of employment.

(3) The starting rate for newly hired office employees shall be 15¢ per hour less than the regular rate during the first thirty (30) days of employment and 5¢ per hour less than the regular rate during the second thirty (30) days of employment.

(4) Longevity pay for covered inside employees shall be 5¢ per hour over the base rate after five (5) years permanent, continuous employment and 10¢ per hour over the base rate after ten (10) years permanent, continuous employment. Longevity pay is based upon continuous years service with the Employer without regard to departments.

(5) Temporary, casual and or seasonal employees are neither covered nor their wages established by the provisions of this Agreement. Truck loaders who do not work more than thirty (30) hours during a work week shall be considered temporary employees.

(6) Any office employee promoted to a higher rated job shall be given a fair trial for a period not to exceed sixty (60) days, at the rate of the higher job classification. If at the end of the trial period, it is determined that the employee is not qualified or adapted to the new position, he or she shall return to the old position, at the same rate of pay which was formerly paid for the old position.

(7) Inside employees bidding on a job in accordance with seniority provisions shall receive the regular rate, beginning the first day he or she is granted the job after the bids are closed.

1. *REST PERIODS*

There shall be two ten (10) minute rest periods during each working day: One to be taken in the morning and one in the afternoon. These rest periods can be taken during a breakdown, shut-down or change over. In no event shall employees be required to take the full twenty (20) minute period, either in the morning or the afternoon. Shift employees working nine and one-half (9½) hours or more in a day will receive a ten (10) minute break when he or she completes the eight (8) hour shift.

APPENDIX D

SUBCHAPTER IV—LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 185. *Suits by and against labor organizations Venue, amount, and citizenship*

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the

United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 82-0-256

GENERAL DRIVERS AND HELPERS
UNION, LOCAL 554,

Plaintiff,

vs.

MID-CONTINENT BOTTLERS, INC.

Defendant.

ORDER ON PRETRIAL CONFERENCE

A final Pretrial Conference was held on the 23rd day of September, 1983. Appearing for the parties were:

M.H. Weinberg
Weinberg & Weinberg, P.C.
8901 Indian Hills Drive
Suite 1
Omaha, NE 68114

Attorney for Plaintiff

George C. Rozmarin
Swarr, May, Smith & Andersen
3535 Harney Street
Omaha, NE 68131

Attorney for Defendant

A. Exhibits in Evidence:

Plaintiff's Exhibits 1, 2 and 3. Defendant's Exhibits 100, 101, 102, 105, 106, 107, 108, 109, 111

and 112. Plaintiff will object to defendant's Exhibits 103, 104 and 110 on the basis of materiality.

B. Foundation for Exhibits:

Plaintiff's Exhibits 1, 2 and 3.
Defendant's Exhibits 100 through 112.

C. Uncontroverted Facts:

1. Plaintiff, General Drivers and Helpers Union, Local No. 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, is a labor organization representing employees in an industry affecting commerce as defined by the Labor Management Relations Act of 1947, as amended; is the exclusive collective bargaining representative of persons working for defendant in the positions of route salesperson, production, warehouse, mechanic, vendor and office; and was party to a collective bargaining agreement with defendant with respect to wages, hours and conditions of employment for said route salespersons and inside employees and in effect from January 1, 1980, through and including December 31, 1982.

2. Defendant, Mid-Continent Bottlers, a Division of Universal Foods Corporation, is a Wisconsin corporation, operating in the State of Nebraska with a plant located at 709 North 108th Street, Omaha, Nebraska 68154; is an employer as defined in the Labor Management Relations Act of 1947, as amended; and is engaged in commerce and is an industry affecting commerce as that term is defined in Section 2 of the National Labor Relations Act, as amended.

3. In December, 1980, defendant notified plaintiff of its desire to reopen certain provisions of the collective bargaining agreement then in effect between the parties pursuant to Article XIX of the Agreement, and negotiations were thereupon conducted between the parties during March through July of 1981. Defendant was represented by Darrell W. Foell, Manager, Labor Relations, and plaintiff was represented by its business agents, Ralph Saar and Charles Hansen, and by Thomas McFarland, Secretary-Treasurer of the Local Union.

4. The Company's proposal was with respect to, and negotiations involved, a revised sales system, which included a change in method of compensation and movement of some sales work outside the bargaining unit. A final written offer was presented by Darrell W. Foell on behalf of defendant to plaintiff on July 9, 1981. The parties were at an impasse.

5. Defendant implemented its final offer on July 20, 1981, and presented an Addendum to the collective bargaining agreement to plaintiff for signature. Plaintiff refused to sign the Addendum advising defendant that there was no agreement.

6. On July 20, 1981, plaintiff filed an unfair labor practice charge with the National Labor Relations Board against defendant claiming, among other things, that the conduct of defendant in implementing its final offer violated 29 U.S.C. §§ 158(a) (1), (3) and (5).

7. On or about August 26, 1981, the Regional Director of the National Labor Relations Board notified the parties that it would not issue a Complaint on the basis of said charge.

8. Neither party has filed a grievance pursuant to the collective bargaining agreement or requested of the other party that the dispute herein be submitted to arbitration.

9. The parties have negotiated a collective bargaining agreement effective January 1, 1983, and in force and effect through December 29, 1985, which agreement supersedes all prior agreements, and which agreement contains an advance sales system but with a higher wage scale than that contained in the Addendum implemented by defendant to the prior preceding agreement.

D. Controverted and Unresolved Issues:

The parties have agreed and previously advised the Court that it is their intention to bifurcate the trial in this matter. Presented herewith are issues relating to liability and scope of remedy, but not the ultimate remedy. Should the Court take jurisdiction and find liability, the parties will attempt to agree as between themselves to the damages involved, and will ask the Court to retain jurisdiction to resolve any disputes which might arise therefrom.

The parties were unable to agree on a statement of controverted and unresolved issues and a statement of elements, and therefore present them separately. Defendant presents its statement as follows:

1. With respect to the subject-matter jurisdiction of the Court to decide matters of contract:

a. Is the dispute between the parties covered by the language contained in Article VI, "Grievance Procedure and Arbitration," of

the 1980-82 collective bargaining agreement between the parties?

b. If so, was arbitration the mandatory and exclusive remedy available to plaintiff?

2. With respect to the subject-matter jurisdiction of the Court to decide unfair labor practice issues:

a. Does the dispute between the parties require a determination of defendant's right to make a unilateral change to the collective bargaining agreement, apart from the contract language itself, upon an impasse in negotiations on the "reopener"?

b. If so, were defendant's rights and obligations covered by § 8(a) (5) of the Act, 29 U.S.C. § 185(a) (5)?

c. If so, is such determination within the exclusive jurisdiction of the National Labor Relations Board?

d. Does dismissal of plaintiff's § 8(a) (5) unfair labor practice charge by the NLRB bar this action?

3. Was there an agreement by plaintiff to matters contained in the Addendum implemented by defendant by virtue of plaintiff's actions and representations and by operation of Article XII, Section 1(b) of its International Union Constitution?

4. With respect to the parties' rights and obligations pursuant to the contract:

a. Was defendant entitled to implement its final offer affecting wages and working conditions

upon impasse in negotiations pursuant to Article XIX, "Reopener," of the 1980-82 collective bargaining agreement between the parties.

b. Was defendant entitled to implement its final offer affecting bargaining unit work upon said impasse?

c. Did the language contained in Article X, "Maintenance of Standard," and Article XIX, "Reopener," of said agreement require defendant to obtain approval and agreement by plaintiff before making such changes?

5. With respect to defendant's right to make a unilateral change upon impasse, do there exist limitations in law other than those which may be contained in the Agreement?

6. Has plaintiff's prayer for specific performance become moot by virtue of the 1983-85 collective bargaining agreement between the parties?

7. *Statement of Elements:*

a. For defendant to establish an exclusive contractual remedy it must show that the central dispute involves a "controversy arising over the interpretation of, or adherence to, the terms or provisions" of the 1980-82 Agreement and that arbitration is the exclusive remedy.

b. For defendant to establish that the Court is without subject-matter jurisdiction regarding any other issues it must show that those

issues involve matters which were the subject of plaintiff's charge within the NLRB and which are within the exclusive jurisdiction of the NLRB.

c. For plaintiff to establish this Court has jurisdiction it must show that either the dispute does not fall within Article VI of the Agreement or that arbitration thereunder did not provide an exclusive remedy, and that no other issue exists which is within the exclusive jurisdiction of the NLRB.

d. For plaintiff to establish that defendant breached the Agreement, it must show that the Agreement itself limits defendant's right to make changes under the "Reopener" to those mutually agreed upon.

e. For defendant to establish that there existed a mutual agreement, it must show that plaintiff agreed to defendant's last offer or that the offer was accepted by operation of Article XII of plaintiff's Constitution.

f. For defendant to establish that plaintiff's prayer for specific performance is moot it must show that the 1980-82 Agreement has expired and been superseded by an agreement providing for a pre-sell System.

* * *

Plaintiff's statement of controverted and unresolved issues and statement of elements are as follows:

1. Can the defendant-employer unilaterally change wages, hours, and working conditions under a collective bargaining agreement under Article XXIX, Reopener, of the plaintiff Exhibit No. 1?

2. Can the defendant-employer unilaterally transfer work assignments outside the bargaining unit to "supervisor" and other non-bargaining unit employees who were and are not bargaining unit employees?

3. If the answer to either (a) or (b) above is yes, does Article X, Maintenance of Standards, require the defendant-employer to obtain the Union's approval to a change in wages and the composition of the bargaining unit?

4. Does the dismissal of the "failure to bargain" unfair labor practice charge by the National Labor Relations Board bar a contractual action for specific performance?

5. Does the fact that the plaintiff's Exhibit No. 1 has an arbitration clause (Article VI) require the plaintiff to arbitrate matters which are to be negotiated as distinguished from matters which are to be interpreted under the collective bargaining agreement?

6. If arbitration is required, is the exclusive remedy arbitration so as to bar this action for specific performance of the collective bargaining agreement?

7. Did the negotiation of a new collective bargaining agreement beginning on January 1, 1983, covering the period January 1, 1983, through December 29, 1985, constitute an agreement to dismiss this action for specific performance?

8. *Statement of Elements:* For the plaintiff to prevail in this case, the plaintiff must show the following:

a. That a unilateral modification of the collective bargaining agreement cannot modify the agreement.

b. That the maintenance of standards clause of the contract requires the employer-defendant to maintain the current conditions of employment in absence of any bilateral change in those conditions.

c. That the determination of the National Labor Relations Board, as to the existence or nonexistence of an unfair labor practice, is absolutely and totally immaterial to the determination of the specific performance of a contract.

d. That the National Labor Relations Board has no jurisdiction in determining the terms and conditions of a collective bargaining agreement specificall, or in determining their operation insofar as specific performance.

e. That the arbitration clause has no operative effect in this case, as the arbitration clause does not cover interest arbitration, wherein the terms and conditions of employment are negotiated.

f. That the arbitration clause is further not applicable since it is not a mandatory arbitration clause.

g. That the arbitration clause is not the sole and exclusive remedy for obtaining specific performance of the terms and conditions of a collective bargaining agreement.

h. That there was no tacit agreement or acquiescence in the actions of the employer in implementing their unilateral change in the terms and conditions of employment under Article XII of the Constitution of the International Brotherhood of Teamsters because said particular article allows the Executive Board to take over negotiation in an attempt to further negotiate the contract themselves, even in those situations where the employees take no strike vote. This is especially so when the employees vote not to accept the offer made.

i. That International Brotherhood of Teamsters has no effect in this case, as that is solely between the members of the local union itself, and the defendant-employer is not a third party beneficiary of said contract.

j. That negotiation of a new agreement for the year beginning January 1, 1983 and running through December 29, 1985 is not a waiver of any causes of action accrued under the prior agreement, or an acquiescence in what has been done since the wages in this agreement were substantially improved.

E. Witnesses: All witnesses whom the plaintiff expects to call to testify, except those who may be called for impeachment purposes only are:

Ralph Saar
Charles Hansen
Thomas McFarland
Jerry Younger
c/o Teamsters Local No. 554
4349 South 90th Street
P. O. Box 27005
Omaha, NE 68132

All witnesses whom the defendant expects to call to testify, except those listed in the preceding paragraph as expected to be called by the plaintiff and except those who may be called for impeachment purposes only, are:

Darrell W. Foell
Manager, Labor Relations
Universal Foods Corporation
433 East Michigan
Milwaukee, Wisconsin 53202

Dale Richardson
Vice President/General Manager
Mid-Continent Bottlers, Inc.
709 South 108th Street
Omaha, NE 68154

F. Expert Witnesses' Qualifications: Experts to be called and their qualifications are: None.

G. Depositions and Other Discovery Documents:

1. All depositions, answers to written interrogatories and requests for admissions or portions thereof which are expected to be offered in evidence by the plaintiff as part of the plaintiff's case-in-chief are:

None except plaintiff reserves the right to take the deposition of Charles Hansen to be used and presented for trial due to his heart condition.

Objections by the defendant are: None.

2. All depositions, answers to written interrogatories, and requests for admissions or portions thereof which are expected to be offered in evidence by the defendant as part of the defendant's case-in-chief are: None.

H. Length of Trial: Counsel estimate the trial will consume not less than one (1) day, nor more than three (3) days and probably two (2) days.

I. Trial Date:

GENERAL DRIVERS AND HELPERS UNION, LOCAL NO. 554, Plaintiff,

By /s/ M. H. Weinberg
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Omaha, NE 68114
(402) 397-0999

MID-CONTINENT BOTTLERS, INC.

Defendant,

By /s/ George C. Rozmarin
of SWARR, MAY, SMITH & ANDERSEN

3535 Harney Street
Omaha, NE 68131
(402) 341-5421

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-419

In The
Supreme Court of the United States
October Term, 1985

GENERAL DRIVERS AND HELPERS UNION, LOCAL NO. 554, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

vs.

MID-CONTINENT BOTTLERS, INC., (Omaha Division), an Iowa Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent disagrees with petitioner's statement of the question presented for reasons set forth in respondent's Statement of the Case. The question more appropriately framed would be whether the Court of Appeals erred in finding the dispute submitted was subject to arbitration.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Respondent disagrees with petitioner's statement in the following particulars. Petitioner filed a complaint seeking specific performance of the collective bargaining agreement. Respondent's motion for summary judgment,

asserting that the dispute was subject to the grievance and arbitration provision of the agreement, was resisted by petitioner and was overruled by the district court. The parties stipulated as follows: "Neither party has filed a grievance pursuant to the collective bargaining agreement or requested of the other party that the dispute be submitted to arbitration." (App. 90, ¶ 8)

The circuit court stated that "the Union claims the only matter for resolution is the amount of compensation the bargaining unit members should have received after the Company implemented its new sales program." Petitioner prayed for and the district court awarded the compensation rates set forth in the agreement. (App. 32) Because the dispute was subject to Article VI of the agreement, "Grievance Procedure and Arbitration," the circuit court held that the action should have been dismissed.

ARGUMENT

Summary of Argument

The dispute was subject to the grievance and arbitration provision of the collective bargaining agreement. Petitioner did not request arbitration, nor did it file its action to compel arbitration. The circuit court's decision was, thus, correct and consistent with public policy and this Court's prior decisions.

Reasons for Denying the Petition

There is no conflict between circuits on the issue decided. Under this Court's *Steelworkers Trilogy* and its

progeny in all circuits, proper deference was given to the unambiguous language of the agreement which provided in pertinent part as follows:

> Any controversy arising over the interpretation of, or adherence to, the terms or provisions of this Agreement shall be settled by negotiations between the Union and the Employer. Any grievance must be presented to the Employer within seven (7) working days after occurrence of the event giving rise to the grievance, or it shall be considered waived. Such controversy may be referred to arbitration. . . .

Petitioner sought, and obtained from the district court, an order which, upon an adjudication of the merits, applied the stated contract rates. Petitioner did not seek rates which were yet to be determined. In other words, the choice presented to the lower courts was between the Respondent's wage rates, implemented upon impasse in negotiation, and the pre-reopener contract rates. The dispute did not involve interest arbitration.

Petitioner, for the first time herein, cites to Article II of the Agreement. That provision as quoted by petitioner, however, refers to the grievance and arbitration provisions of the Agreement, which petitioner did not invoke. The cases relied upon by the petitioner involved actions by a union to compel arbitration, just the opposite of petitioner's position in this action.

It is questionable whether there exists a current split in circuits on the abstract issue as framed to the Court by petitioner; the *Potter Press* case cited by petitioner was decided prior to the *Trilogy*. However, because of the manner in which the issue in dispute was framed to the lower courts and the manner in which the lower courts decided the dispute, the issue of interest arbitration is irrelevant.

Finally, the issue presented by petitioner in no other way meets the criteria justifying certiorari.

———o———

CONCLUSION

For the reasons stated above it is submitted that the decision of the court of appeals in this case does not warrant review by this Court and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/ Geroge C. Rozmarin
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Counsel for Respondent